91-1873

No. _____

Supreme Court, U.S.
FILED
MAY 19 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Petitioners,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL DELIKAT
Counsel of Record
JILL L. ROSENBERG
ORRICK, HERRINGTON & SUTCLIFFE
599 Lexington Avenue
New York, New York 10022
(212) 326-8800

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether, as the Court of Appeals for the Second Circuit held, this Court's decision in *Switchmen's Union v. National Mediation Bd.* ("*Switchmen's*"), 320 U.S. 297 (1943), precludes all meaningful judicial review of actions by the National Mediation Board in the conduct of union representation elections under the Railway Labor Act ("RLA")?

2. To the extent that *Switchmen's* can be read to preclude all meaningful judicial review of a certification of a bargaining representative by the NMB, should *Switchmen's* (a 4-3 decision whose majority opinion was written by Justice Douglas) be clarified or overruled?

PARTIES

The Petitioners are Virgin Atlantic Airways, Ltd. ("Virgin Atlantic"), a "common carrier by air" within the meaning of Title II of the RLA, and Mario Batista, Lawrence French, Julio Rosa, Jose Marcello Garcia, John Aquino and Edgar Lambertus, six of Virgin Atlantic's fleet service employees covered by the NMB certification. Virgin Atlantic's parent company is Voyager Travel (Holdings) Ltd. (U.K.) and Virgin Atlantic has no affiliates or subsidiaries other than wholly owned subsidiaries.

Respondent National Mediation Board (the "Board" or "NMB") is an independent agency in the executive branch of the United States government charged, among other duties, with the obligation to investigate representation disputes among employees of carriers subject to the RLA, and of mediating disputes over changes in agreements between such carriers and representatives of their employees.

Respondents International Brotherhood of Teamsters, Local 851 and International Brotherhood of Teamsters Airline Division (collectively referred to as "Teamsters" or the "Union") are the labor organizations certified by the NMB as the representative of the craft or class of Virgin Atlantic's fleet service employees for purposes of collective bargaining under the RLA. Respondents Anthony Farina and William Genoese are officers of the Union.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE NMB'S ACTIONS HEREIN ARE SUBJECT TO FULL JUDICIAL REVIEW BECAUSE ITS STATUTORY POWER AND JURISDICTION ARE AT ISSUE	7
II. THE ROLE OF THE FEDERAL COURTS IN ENFORCING THE RLA DEPRIVED THE NMB OF ANY AUTHORITY TO IGNORE THE RULING OF THE FEDERAL COURT IN HODGES V. VIRGIN ATLANTIC	14
III. SWITCHMEN'S SHOULD BE CLARIFIED OR OVERRULED TO THE EXTENT IT PRECLUDES MEANINGFUL JUDICIAL REVIEW OF ALL ACTIONS OF THE NMB WITH RESPECT TO CERTIFICATION OF BARGAINING REPRESENTATIVES	16
CONCLUSION	19

PAGE

APPENDICES

Appendix A

Opinion and Judgment of the U.S. Court of Appeals for the Second Circuit 1a

Appendix B

Judgment and Order of the U.S. District Court for the Eastern District of New York 25a

Appendix C

Certification of National Mediation Board 28a

Appendix D

Text of Statute Involved 30a

Appendix E

Text of National Mediation Board Rules Involved 33a

Appendix F

Affidavit of Michael Delikat in Support of Plaintiffs' Motion for Summary Judgment, filed March 7, 1991 37a

Declaration of Charles R. Barnes, Executive Director of the National Mediation Board, filed December 19, 1988 ..... 54a

TABLE OF AUTHORITIES

Cases PAGE

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16

Air Canada v. National Mediation Bd., 478 F. Supp. 615 (S.D.N.Y. 1979) 11

Airline Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) 9, 10

Airline Stewards and Stewardesses Ass'n v. Trans World Airlines, 173 F. Supp. 369 (S.D.N.Y. 1959), *aff'd*, 273 F.2d 69 (2d Cir.), *cert. denied*, 362 U.S. 988 (1960) 10

British Airways v. National Mediation Bd., 685 F.2d 52 (2d Cir. 1982) 17

Brotherhood of Ry. and Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965) 7, 8

Chicago & Northwestern Ry. Co. v. United Transp. Union, 402 U.S. 570 (1971) 15

Decker v. Linea Aeropostal Venezolana, 258 F.2d 153 (D.C. Cir. 1958) 14

Delpro Co. v. National Mediation Bd., 509 F. Supp. 468 (D. Del. 1981) 10, 13

Delpro Co. v. Brotherhood Ry. Carmen, 519 F. Supp. 842 (D. Del. 1981), *aff'd*, 676 F.2d 960 (3d Cir.), *cert. denied*, 459 U.S. 989 (1982) 10, 11, 13

Hodges et al. v. Virgin Atlantic Airways, 88 Civ. 1370 (S.D.N.Y. 1988) 3, 14

PAGE

International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, 839 F.2d 809 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 820 (1988) 17

International Bhd. of Teamsters v. Brotherhood of Ry. and Steamship Clerks, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) 17

International In-Flight Catering Co. v. National Mediation Bd., 555 F.2d 712 (9th Cir. 1977) 12

International Longshoremen's Ass'n v. North Carolina Ports Authority, 463 F.2d 1 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) 9, 13

Maas v. Frontier Airlines, 676 F. Supp. 224 (D. Colo. 1987) 14

Philippine Airlines v. National Mediation Bd., 430 F. Supp. 426 (N.D. Cal. 1977) 12

Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) ..... *passim*

United States v. Feaster, 410 F.2d 1354 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969) 9, 13

Virgin Atlantic Airways v. National Mediation Bd., 956 F.2d 1245 (2d Cir. 1992) 2

Virgin Atlantic Airways v. National Mediation Bd., 15 N.M.B. 170 (1988) 4

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 14

WES Chapter, Flight Engineers' Int'l Ass'n v. National Mediation Bd., 314 F.2d 234 (D.C. Cir. 1962) 14

PAGE

Statutes

28 U.S.C. § 1254(1) 2

Railway Labor Act
Section 1, Fifth, 45 U.S.C. § 151, Fifth 11
Section 2, Third, 45 U.S.C. § 152, Third 14
Section 2, Fourth, 45 U.S.C. § 152, Fourth 11, 14, 15
Section 2, Ninth, 45 U.S.C. § 152, Ninth 11, 12

Rules

NMB Rule 1206.06, 29 C.F.R. § 1206.6 ..... 3, 11

NMB Representation Manual, § 5.304 ..... 3, 12

Other Authorities

Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401 (1958) 16, 17

Sunstein, *Interpreting Statutes*, 103 Harv. L. Rev. 405 (1989) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Petitioners,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit entered on February 20, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-24a)[1] is officially reported at 956 F.2d 1245 (2d Cir. 1992). The Order of the District Court granting summary judgment in Petitioners' favor (App. B, 25a-27a) was not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals (App. A, 1a) was entered on February 20, 1992. This petition is filed within ninety (90) days from that date. The jurisdiction of this Court to review that judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the RLA, as amended, 45 U.S.C. §§ 151 *et seq.*, are set forth in Appendix D (30a-32a).

STATEMENT OF THE CASE

The opinion below reverses an order entered in the United States District Court for the Eastern District of New York, Glasser J., setting aside the certification by the NMB of the Teamsters as the bargaining representative of the fleet service employees of Virgin Atlantic (25a-27a). The basis of Petitioner's challenge to the NMB certification arose out of the inclusion of four ballots of former employees of Virgin Atlantic whose claims for reinstatement had been dismissed by the United States District Court for the Southern District of New York (Stanton, J.) at the time the ballots were counted. But for the inclusion of the ballots of these four non-employees, the Teamsters would not have obtained a majority and would not have been certified by the NMB. The NMB therefore cer-

---

1 The pages of the Appendices to this petition are referred to as "____a."

tified a representative not designated by a majority of employees voting. In reversing the District Court, the Court of Appeals held that the District Court did not have jurisdiction to review the NMB's actions (10a).

Factual Background

On or about February 17, 1988, the Union filed with the NMB an Application for Investigation of Representation Dispute, activating the NMB's election process (54a-55a, 62a-63a). Within days after filing this Application, the Union commenced an action in federal court (*Hodges et al. v. Virgin Atlantic*, 88 Civ. 1370 (Stanton, J.)) claiming, *inter alia*, that Virgin Atlantic had terminated six employees on or about February 6, 1988 in retaliation for their support of union representation (64a-70a). The action sought, *inter alia*, reinstatement of five of the six named individuals (one of the individuals had been recalled to work *prior* to the commencement of the action) (38a, 69a).[2] Virgin denied the material allegations of the complaint, asserting that the terminations, which occurred in the context of other employees being laid off in a reduction of force, were done for reasons wholly unrelated to union activity (38a).[3]

The *Hodges* court granted Virgin Atlantic's request to consolidate the trial on the merits with the hearing on the preliminary injunction application and ordered expedited discovery (38a). Virgin Atlantic's request for an expedited disposition was based upon the NMB rule (found both in the rules of the National Mediation Board, 29 C.F.R. § 1206.6 (33a) and in the NMB's Representation Manual, Section 5.304 (35a-36a)) that individuals with pending actions for reinstatement were eligible to vote and the fact that the inclusion of the four dis-

---

2 Another of the six plaintiffs was ruled ineligible to participate in the election for reasons unrelated to this case (59a-60a), thereby leaving four disputed ballots.

3 By commencing the *Hodges* action, the Union was able to obtain the necessary showing of interest to proceed to an election, as the authorization cards of the discharged workers who had an action for reinstatement pending were counted (38a).

charged individuals could have an outcome determinative impact on the election since the unit of employees voting was less than twenty without these four (39a). The *Hodges* court set April 25, 1988 as the date for the trial on the merits and, aware of the significance of determining the status of the discharged individuals as quickly as possible, announced that the court would rule upon the claims for reinstatement at the conclusion of the evidence (39a). In what the NMB has claimed was sheer coincidence, the NMB set April 25 as the date for counting the ballots, the same day as the trial date in *Hodges* (71a-72a).

Virgin Atlantic thereupon requested that the ballots of the discharged individuals not be counted until such time as the *Hodges* court had determined whether or not such individuals should be reinstated to their former positions of employment (80a-82a). By telex dated April 19, 1988 to the parties, the NMB granted the request for a postponement of the April 25 count date until "a later date after all questions of eligibility have been determined" (43a).

The *Hodges* court heard evidence on April 25 and concluded the trial of that action on April 26 (39a). That same day, in complete disregard of their earlier ruling embodied in the April 19 telex, the NMB issued a telex announcing it would count "all ballots of eligible employees" at 2:00 p.m. on Wednesday, April 27 (83a-84a).[4] No reference was made to the NMB's April 19 ruling that the count would be delayed until "a later date after all questions of eligibility have been determined."

On April 27, 1988, at 11:30 a.m., the *Hodges* court dismissed the four claims for reinstatement in their entirety, and advised counsel that they could advise the NMB that "by my order entered on the record this morning, the individual claims for reinstatement and backpay are dismissed" (44a,

---

4 The April 26 telex was subsequently issued as a formal published decision of the NMB, *Virgin Atlantic Airways*, 15 N.M.B. 170 (1988) (28a-29a).

51a-52a). The NMB was immediately advised by telephone and telex of this outcome (40a, 53a).

The NMB acknowledges that it was aware of the *Hodges* dismissal *before* the ballots were counted, yet when the NMB counted the ballots, it *included* the ballots of the four individuals whose claims for reinstatement had been dismissed (40a). Twelve ballots, including the four in contention, were cast for Teamsters Airline Division. The NMB ruled that there were twenty-one eligible voters, including the four in contention. According to NMB's determination, 12 out of 21, or a majority, cast ballots for representation (91a-92a). If the four ballots had *not* been counted, the Union would have received 8 votes out of *17* eligible voters and would therefore *not* have obtained a majority. On May 2, 1988, the NMB issued its certification of representation (28a-29a).

Virgin Atlantic and several fleet service employees commenced the instant action seeking to invalidate the NMB certification. After the completion of discovery, Virgin moved for summary judgment. By Judgment and Order dated June 24, 1991, the district court granted summary judgment to Virgin invalidating the NMB certification (25a-27a). On appeal, the Second Circuit Court of Appeals reversed (1a-24a).

REASONS FOR GRANTING THE WRIT

The court below has decided an important and recurrent question of federal labor law—whether the actions of the NMB with respect to all representation matters are immune from meaningful judicial review. Although *Switchmen's* specifically speaks to one narrow issue—the NMB's right to make determinations free from judicial review involving jurisdictional disputes between two unions—it has been interpreted by subsequent lower court decisions to effectively preclude any judicial review of the NMB's actions. Without the *ex ante* deterrent of potential judicial review, and the *ex post* corrective of actual judicial review, the NMB has, for at

least the last two decades, embarked upon its own political agenda with little regard for effectuating the purpose of the statute, regulations and in many cases, its own rules codified in its own Representation Manual.

By this Court's recent refusals to revisit and clarify the breadth of *Switchmen's*, and the resultant lack of judicial scrutiny, patently erroneous results such as the one below have become commonplace. While in this case, the lack of meaningful review resulted in a union being certified based upon the inclusions of ballots from individuals who are not employees within the meaning of the RLA, this ruling and its result are by no means unique. Dozens of other cases testifying to the NMB's abusive exercise of its powers have reached various Courts of Appeals in the past years, at a time when the airline industry has undergone dramatic change and been in extreme ferment.

If ever a case presented a compelling set of circumstances for judicial scrutiny of administrative agency action, this case cries out for such review. At issue herein is not only the ultimate decision of the NMB to grant a voting franchise and outcome determinative power to individuals who were not "employees" within the meaning of the RLA and have never returned to work for Virgin Atlantic. Additionally, the process by which the NMB reached that decision, in complete disregard of an earlier decision to delay the count of the ballots pending the federal court's ruling, was completely arbitrary, capricious and an abuse of discretion. And finally, the fact that the NMB's actions were in complete disregard of a federal court's determination in an area where the federal court is vested with authority to determine whether former employees shall be reinstated, provides yet another basis for judicial review.

This case presents yet another plea to this Court to examine whether or not Congress intended that the NMB should be treated so differently in judicial review and neutrality of action than virtually every other federal agency. Permitting judicial review in this case will remove the anomaly of an

administrative agency entrusted with the protection of statutory rights itself functioning free of any check on that administrative action—despite the fact that the statute itself does not forbid such judicial review. The NMB will undoubtedly argue that judicial review of NMB certifications will increase the number of attempts by carriers, unions and other employee groups who lose elections to overturn NMB certified election results. While the proverbial floodgates of litigation may indeed open in the short term, the ultimate effect will be the effectuation of the letter and the spirit of the RLA. That clearly is a desirable result.

I. THE NMB'S ACTIONS HEREIN ARE SUBJECT TO FULL JUDICIAL REVIEW BECAUSE ITS STATUTORY POWER AND JURISDICTION ARE AT ISSUE

In holding that the instant dispute concerning the validity of the NMB's certification was not subject to the jurisdiction of the district court, the court below relies principally on *Switchmen's Union v. National Mediation Bd.* (*"Switchmen's"*), 320 U.S. 297 (1943), and *Brotherhood of Ry. and Steamship Clerks v. Association for the Benefit of Non-Contract Employees* (*"Non Contract"*), 380 U.S. 650 (1965), for the proposition that representation disputes which involve controversies surrounding the designation and authorization of representatives of employees are committed to the exclusive jurisdiction of the NMB. Any fair reading of these cases establishes, however, that they do not foreclose judicial review in all cases and specifically do not foreclose review of whether the NMB had the jurisdictional power to grant "employee" status to individuals who are indisputably not "employees" within the meaning of the RLA. Unlike *Switchmen's* and *Non Contract*, full judicial review is available in the instant case because of the "type of problem involved." *Switchmen's*, 320 U.S. at 301.

Switchmen's involved a jurisdictional dispute between two rival unions to represent the same railroad yardmen. In a 4-3 decision written by Justice Douglas, this Court held that the Board's determination made during the representation pro-

ceedings as to which of the two unions was entitled to represent the employees was within the Board's discretion and thus not subject to judicial review, for to permit pre-certification review would, "in the face of special circumstances which obtain[ed]" in that case, contrary to Congress' intent, impede and drag out the established procedures for certifying a representative. 320 U.S. at 300, 305-06. The "special circumstances" cited were that the legislative history of Section 2, Ninth showed that Congress was desirous of insulating from judicial review the "explosive problem" of "jurisdictional disputes between unions." *Id.* at 302-03. The Court did not have occasion to address whether a district court's jurisdiction to review "any law regulating commerce" might be available if an action of the Board "would have robbed the Act of its vitality and thwarted its purpose." *Id.* at 300-01.

Similarly, in *Non Contract*, this Court held that the NMB's determination that a grouping of clerical, office, stores, fleet and passenger service employees constituted an appropriate class or craft to participate in a representation election was also not reviewable so long as the Board, prior to defining the appropriate group, conducted its statutorily required investigation. 380 U.S. at 654. This Court also held that the Board's selection of a particular ballot form for use in the representation election was incident to its duty to resolve representation disputes and that the Board's decision was not subject to judicial review absent a showing that the Board acted in excess of its statutory authority. *Id.* at 669.

Thus, *Switchmen's* and *Non Contract* establish that where the Board exercises discretionary powers granted by the RLA to resolve factual or procedural representation disputes such as determining the appropriate class or craft or selecting a ballot form for use in an election, judicial review must be extremely narrow so that the Board is not impeded in its duty of expeditiously certifying a representative by "the haggling and delays of litigation." *Non Contract*, 380 U.S. at 671. This action, however, challenges whether the Board can, through a tortured application of some of its rules, disregard of other rules and reliance on "practices" not codified by

regulation or rule, extend its jurisdiction to embrace individuals who were not employees within the meaning of the RLA.

In cases where the Board's statutory authority is at issue, courts will and should apply a standard of full judicial review provided that the Board's proceedings have been completed. Thus, in *United States v. Feaster*, 410 F.2d 1354 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969), the Fifth Circuit held that "while *Switchmen's Union* holds that there is no judicial review where the Board has exercised its informed discretion in resolving inter-union representation disputes, it does not preclude judicial review of questions of law which bear directly upon the jurisdiction of the Mediation Board." 410 F.2d at 1361. The court in *Feaster* concluded that the Supreme Court intended to proscribe judicial review of NMB decisions only where the Board was exercising discretionary powers granted by the RLA, and that it did not intend to eliminate review of questions relating to the extent of these NMB powers. *Id.* Thus, the NMB's determination that the employer in question was a "carrier" as defined by Section 1, First of the RLA, 45 U.S.C. § 151, First, was a jurisdictional question and might be a proper subject for judicial review. *Id.* at 1364.

Relying on the reasoning in *Feaster*, the Fourth Circuit in *International Longshoremen's Ass'n v. North Carolina Ports Authority*, 463 F.2d 1 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972), reviewed a final Board determination that the employer in question was a "carrier" within the meaning of the RLA. The court held that the Board's finding that the employer was a "carrier" was subject to review because it was an issue of the Board's jurisdictional power. 463 F.2d at 3. The court also took notice of the general presumption in favor of judicial review of administrative action. *Id.*

The D.C. Circuit reviewed a jurisdictional question relating to Board jurisdiction over *employees* in *Airline Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951). There, the court held that

Switchmen's did not preclude judicial review of whether the NMB could exercise its powers over employees of an airline geographically situated outside the continental limits of the United States. 189 F.2d at 688. Reviewing the NMB's decision under Section 10 of the Administrative Procedure Act, as well as the RLA, the court ultimately affirmed the Board's determination that it had no jurisdiction over an air carrier and its employees located entirely outside the continental United States. *Id.* at 690-91.

Similarly, in *Airline Stewards and Stewardesses Ass'n Int'l v. Trans World Airlines*, 173 F. Supp. 369, 378 (S.D.N.Y. 1959), *aff'd*, 273 F.2d 69 (2d. Cir.), *cert. denied*, 362 U.S. 988 (1960), it was determined after judicial review that NMB jurisdiction did not extend to employees of airlines who were foreign nationals flying wholly outside the United States.

In *Delpro Co. v. National Mediation Bd.*, 509 F. Supp. 468 (D. Del. 1981) and *Delpro Co. v. Brotherhood Ry. Carmen*, 519 F. Supp. 842 (D. Del. 1981), *aff'd*, 676 F.2d 960 (3d Cir.), *cert. denied*, 459 U.S. 989 (1982), the court reviewed a Board determination that an employer was a carrier, recognizing that it was faced with a jurisdictional question that did not fall within the limitations on judicial review established in *Switchmen's* and *Non Contract*. Those limitations apply "only to factual and procedural determinations expressly or impliedly delegated to the NMB as necessary to its duty to resolve representation disputes, and which, if subject to judicial review either during the course of or after the completion of the administrative proceedings, would tend to delay certification of a representative." 509 F. Supp. at 474-75. Thus, the court made a further distinction between NMB determinations, such as class or craft decisions, which are not reviewable, and questions of the Board's jurisdiction, which are subject to review. The former, if subject to immediate judicial review, would delay the representation election or, if subject to post-certification review, would require a new election if the appeal was successful. *Id.* at 475. As applied to the instant case, post-certification review of the NMB's actions either would result in the certificate remaining in

force or would void the certificate if the court determines that the NMB acted without authority. Thus, post-certification judicial review of the Board's actions neither delays the election and certification process nor requires further administrative proceedings.

On appeal, the Third Circuit in *Delpro* affirmed the district court's finding of carrier status as well as its conclusions as to the scope of review. Indeed, the court held:

> Whatever the limitations may be upon judicial review of NMB decisions concerning the division of employees into appropriate classes or crafts or concerning the selection of a ballot for use in a representation election, judicial review of NMB decisions concerning its own jurisdictional authority is not barred.

Delpro Co., 676 F.2d at 962 (footnote omitted) (citations omitted).

Just as the federal courts can review a decision of the Board as to whether a company was a "carrier" within the meaning of the RLA, a court can review the Board's decision to count ballots of individuals who were not "employees" within the meaning of the statute at the time their ballots were counted. The special competence of the NMB lies in the field of labor relations rather than statutory construction. *Switchmen's*, 320 U.S. at 321 (Reed, J., dissenting).

This is a dispute where the Board ignored clear statutory language. Section 2, Fourth and Ninth of the RLA limit the NMB's authority to conduct elections only of "employees" defined in Section 1, Fifth as persons "in the service of a carrier." 45 U.S.C. §§ 151, Fifth and 152, Fourth; *Air Canada v. National Mediation Bd.*, 478 F. Supp. 615, 616 (S.D.N.Y. 1979). These provisions are qualified by NMB Rule 1206.06, 29 C.F.R. § 1206.6 (33a), which provides that:

> Dismissed employees whose requests for reinstatement on account of wrongful discharge are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which

> they are employed at the time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

This rule is further qualified by the NMB's Representation Manual, Section 5.304 (35a-36a), which provides that a discharged or terminated employee shall not be considered eligible to participate in an election if his or her "grievance or court action has been finally acted upon and the discharge has been upheld prior to the count of the ballots."

Here, there is no dispute that the reinstatement actions had been dismissed "prior to the count of the ballots." The NMB's failure to follow its Manual in the instant case is therefore a statutory violation of the RLA. Critically, NMB Manual Section 5.304 was promulgated pursuant to the NMB's statutory duty under Section 2, Ninth of the Act "to establish the rules to govern the election" and in the furtherance of the statutory provisions and NMB Rules that define an employee for purposes of the Act. Section 5.304 of the Manual specifically cites to Rule 1206.06. Additionally, NMB Manual Section 5.304 is set forth in the Notice of Election which is posted by the employer on its premises in order to advise the employees of the dates of the election and of the election and eligibility rules (73a-79a). Finally, in reciting the statutory and procedural scheme of the RLA, the NMB has relied heavily on its Manual. The NMB Manual has, in fact, been found by courts to be binding on the NMB. *See International In-Flight Catering Co. v. National Mediation Bd.*, 555 F.2d 712, 718 (9th Cir. 1977). In addition, courts have closely scrutinized claims that the NMB has violated its Manual. *See Philippine Airlines v. National Mediation Bd.*, 430 F. Supp. 426, 429 (N.D. Cal. 1977) (court inquired as to whether NMB followed definition of "majority" contained in Section 305.9 of Manual).

There is also no dispute in this case that at the time the ballots of the four discharged individuals were counted, the NMB was aware that a United States District Court had

determined that they had no right to reinstatement and hence, were not "employees" under any fair reading of the statute and regulations. To overcome this undeniable fact, the court below relies on the self-proclaimed NMB "practice" not codified by regulation, that where the count is delayed, the *status quo* that existed on the original count date will be preserved. Significantly, when the Board by its April 19 telex delayed the count until after "*all* questions of eligibility have been determined," it made no mention of preserving the *status quo*. As such, unwritten NMB "practices" articulated after action has been taken (here, the delay of the count), should not be permitted to overcome the clear letter and intent of the regulations and statute.

In counting the votes of these four non-employees, the NMB not only acted contrary to its own written rules, but also acted beyond its jurisdictional authority. Just as the NMB may not exercise control over an employer who is not a carrier under the RLA, so any action which grants a voting franchise to persons who are not employees of a carrier is similarly without authority. Simply put, it is outside of the NMB's power to include persons in the ballot count who are not employees, and the artifice of an after-the-fact proclaimed practice should not change that obvious result.

The Board's counting of the four non-employees' ballots in this case was not an exercise of its discretionary authority simply because the Board had to interpret the meaning of "employees" under the Act. Even in resolving jurisdictional issues, the Board must interpret language of the RLA. Thus, in *Feaster*, *North Carolina Ports Authority* and *Delpro*, *supra*, courts interpreted and applied the statutory language defining a carrier in order to determine whether the Board had properly exercised jurisdiction over the employer. Similarly, in the instant case, the Board was required to determine whether an individual, whose action for reinstatement was finally acted upon by a United States District Court, was an employee for election purposes. Thus, this case stands in con-

trast to a line of cases[5] where the Board must make factual discretionary determinations as to the appropriate class or craft or to the eligibility of certain employees where their status as "employees" of the carrier is not in dispute. *There were no disputed factual or procedural questions in this case which required the NMB to exercise its investigatory function.*

II. THE ROLE OF THE FEDERAL COURTS IN ENFORCING THE RLA DEPRIVED THE NMB OF ANY AUTHORITY TO IGNORE THE RULING OF THE FEDERAL COURT IN HODGES V. VIRGIN ATLANTIC

Under the RLA, an individual who believes he has been discharged for engaging in union activities must commence an action in the federal court alleging carrier interference under Sections 2, Third and 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third and 152, Fourth. The federal court then determines whether reinstatement as an "employee" is appropriate. *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 543-4 (1937); *Maas v. Frontier Airlines*, 676 F. Supp. 224 (D. Colo. 1987).

In earlier related proceedings in the instant case, the four individuals in issue were plaintiffs in an action (*Hodges et al. v. Virgin Atlantic Airways*, 88 Civ. 1370) seeking reinstatement to their former positions. After a full trial on the merits which concluded before the NMB counted the ballots, Judge

---

5 *See, e.g., Switchmen's*, 320 U.S. at 298-300 (class or craft determination as to which of two unions was entitled to be employees' representative not reviewable); *Decker v. Linea Aeropostal Venezolana*, 258 F.2d 153, 154 (D.C. Cir. 1958) (question whether individual employee was eligible to vote not subject to review); *see also WES Chapter, Flight Engineers' Int'l Ass'n v. National Mediation Bd.*, 314 F.2d 234, 237 (D.C. Cir. 1962), where the court refused to review an NMB determination that former striking employees were *outside* of the Board's jurisdiction to include in an election, an argument similar to the one made herein that the four discharged workers were outside the Board's jurisdiction to include in an election.

Stanton dismissed the claims for reinstatement stating, on the record:

> [Y]ou are free to advise the NMB or anybody else of the fact which is that by my order entered on the record this morning, the individual claims for reinstatement and backpay are dismissed (52a).

The RLA gives the federal court, and not the NMB, exclusive jurisdiction to award reinstatement for alleged union discrimination. In the instant case, the NMB appeared to recognize the court's authority on these matters when on April 19, 1988, the NMB granted Virgin's request to postpone the count pending the court's determination to "a later date after all questions of eligibility have been determined (43a)." Yet, by thereafter disregarding that decision and counting the four disputed ballots at a time after Judge Stanton had dismissed the claims for reinstatement, the NMB clearly exceeded its authority with respect to representation matters. To accept the NMB's position herein would vitiate the statutory role expressly delegated to the federal courts to determine reinstatement rights for employees allegedly discharged as a result of carrier interference.

Moreover, to the extent the federal courts have jurisdiction to protect Section 2, Fourth majority rights against *carrier* interference, it follows that the federal courts also have jurisdiction to protect those majority rights against deprivation by "practices" followed by the NMB. Under the three part test of judicial enforceability of RLA obligations set forth in *Chicago & Northwestern Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578 (1971), judicial review of the Board's duty to protect Section 2, Fourth majority rights would be proper. The test included:

> [1] the importance of the duty in the scheme of the Act, [2] the capacity of the courts to enforce it effectively, and [3] the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

This case therefore can be distinguished from every case decided since *Switchmen's* as providing for no, or extremely narrow, judicial review, since none of those cases involved actions by the NMB nullifying the federal court's statutory mandate. As such, this case presents an independent basis of full judicial review because the NMB's action was contrary to an order of a federal court authorized under the statute.

III. SWITCHMEN'S SHOULD BE CLARIFIED OR OVERRULED TO THE EXTENT IT PRECLUDES MEANINGFUL JUDICIAL REVIEW OF ALL ACTIONS OF THE NMB WITH RESPECT TO CERTIFICATION OF BARGAINING REPRESENTATIVES

As this Court stated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967):

> [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

This "presumption" in favor of judicial review of agency action has been echoed by a number of noted commentators in the administrative law area. *See, e.g.*, Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 432 (1958) ("[J]udicial review is the rule. It rests on the congressional grant of general jurisdiction to the Article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest"). Professor Cass Sunstein states the case in support of this presumption in favor of judicial review with clarity:

> [C]ourts presume that the legislature has not precluded judicial review of agency decisions. This presumption is partly attributable to a belief—vindicated by recent experience—that regulatory agencies are susceptible to factionalism and self-interested representation. Judicial review operates as both an ex ante deterrent against dan-

> gers of this sort and an ex post corrective. If Congress is to eliminate judicial review, it must do so unambiguously.

Sunstein, *Interpreting Statutes*, 103 Harv. L. Rev. 405, 475 (1989). Therefore, as an aberration to the general presumption of judicial review of agency action, *Switchmen's* has been sharply criticized by one noted scholar of administrative law:

> If the Court [in *Switchmen's*] had started with the initial premise that the principle of review embodies a great institutional safeguard, these pretended inferences of statutory intention to exclude review could not have been seriously entertained. This decision is in some measure, I believe, an expression of the mood of judicial self-deprecation and abdication into which the Court of that period had fallen. Haunted by a past of judicial arrogance, beguiled by the promise of administrative action, a majority of the judges who participated were easily persuaded of the irrelevance of the judicial role.

Jaffe, *supra*, at 430 (footnotes omitted).

Although a case limited by its facts to a jurisdictional dispute between two competing unions, *Switchmen's* has been taken far beyond its original intent. Without the check of judicial review, the NMB's decisions on matters involving representation disputes have led to erroneous and sometimes outrageous results in the industries that form the backbone of this country's transportation system. *See, e.g., International Ass'n. of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 820 (1988); *British Airways v. National Mediation Bd.*, 685 F.2d 52 (2d Cir. 1982).

By engrafting onto *Switchmen's* the requirement that judicial review can only be had for a "gross violation" of the RLA, (*See, e.g, International Bhd. of Teamsters v. Brotherhood of Ry. and Steamship Clerks* , 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968)), post-*Switchmen*

courts have effectively provided for no meaningful review of NMB actions. One must draw this conclusion from the fact that in the entire 58 years of the NMB's existence, no plaintiff (other than Petitioner Virgin Atlantic in the District Court below) has ever been able to prove a "gross violation" of the statute. Nor has any court subsequently justified why a "gross" violation of the statute would be reviewable, but not any other type of statutory violation.

A policy that allows the NMB to fashion "practices" like the one concocted here which preserves the *status quo* as of the original count date without meaningful judicial review validates the concern of the dissent of Mr. Justice Reed in *Switchmen's* that employees have a concrete interest in the selection of a representative under the RLA:

> It was only natural therefore that Congress should assume that where its own creature, the Mediation Board, was charged with interference with the right of employees by a misconstruction of the statute under which it existed, that error of law would be subject to judicial examination to determine the correct meaning.

320 U.S. at 318.

The instant case presents this Court with another opportunity to examine whether or not Congress intended that the NMB be treated so differently in judicial review when its actions on representation matters are so clearly contrary to the letter and the spirit of the statute and so notoriously designed to produce outcome-determinative results which favor large national labor unions. The effect of this Court's refusal to clarify or reconsider *Switchmen's*, despite having previously been presented with the opportunity, will send perhaps a final signal to the NMB that it can do what it wants—that it is its discretion, and not the fundamental policies underlying the RLA, that are preeminent. An interpretation of the RLA that prevents the federal court from asserting jurisdiction to review the Board's action under the special circumstances of this case cannot be allowed to stand.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully submit that a writ of certiorari be granted to review the decision below.

Dated: New York, New York
May 19, 1992

Respectfully submitted,

MICHAEL DELIKAT
JILL L. ROSENBERG
Attorneys for Petitioners

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 687, 688—August Term, 1991

(Argued December 16, 1991 Decided February 20, 1992)

Docket Nos. 91-6211, -6223, -6225, -6253

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Plaintiffs-Appellees, Cross-Appellants,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Defendants-Appellants, Cross-Appellees.

Before:

MESKILL, KEARSE and WINTER,
Circuit Judges.

Appeals and cross-appeals from entry of summary judgments in the United States District Court for the Eastern District of New York, Glasser, *J.* The district court determined that it had jurisdiction to review the certification by the National Mediation Board of the Teamsters as the bargaining representative of certain employees of Virgin Atlantic Airways. Finding that the procedure used by the National Mediation Board grossly violated the Railway Labor Act, the district court set the certification aside. The district court also dismissed the Teamsters' counterclaims and imposed Rule 11 sanctions on the National Mediation Board for a repetitive motion.

We conclude that the district court should not have set aside the certification. Therefore, with one exception, we reinstate the Teamsters' counterclaims. The imposition of sanctions under Rule 11, however, was not an abuse of discretion and is affirmed.

Reversed in part, affirmed in part, judgment vacated and remanded.

FRANK A. ROSENFELD, Department of Justice, Washington, D.C. (Stuart M. Gerson, Assistant Attorney General, William Kanter, Department of Justice, Washington, D.C., Andrew J. Maloney, United

States Attorney for the Eastern District of New York, Brooklyn, NY, Ronald M. Etters, General Counsel, National Mediation Board, Washington, D.C., of counsel), *for Appellant Nat'l Mediation Board.*

JAMES A. MCCALL, Washington, D.C. (James T. Grady, General Counsel, Int'l Brotherhood of Teamsters, Washington, D.C., Jeffrey P. Englander, Morrison, Cohen, Singer & Weinstein, New York City, of counsel), *for Appellant Int'l Brotherhood of Teamsters.*

MICHAEL DELIKAT, New York City (Jill L. Rosenberg, Orrick, Herrington & Sutcliffe, New York City, of counsel), *for Appellees.*

MESKILL, *Circuit Judge*:

These appeals and cross-appeals involve the validity of a review by the United States District Court for the Eastern District of New York, Glasser, *J.*, of the certification of an employee representative under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* The National Mediation Board (NMB) is empowered by section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, to investigate and resolve disputes among employees of a carrier by rail or air as to the identity of their bargaining representative. Once the carrier receives certification from the NMB that a particular individual or organization is the duly autho-

rized representative of a group of employees, the carrier is obligated to bargain with that representative.

The district court erred in determining that it had jurisdiction to review the union certification and incorrectly held that the certification was invalid. The court wrongly dismissed many of the counterclaims brought by the union against the carrier. The district court, however, correctly dismissed the union's counterclaim concerning the status quo provisions of the RLA because there was no pre-existing bargaining relationship between the parties. Finally, we hold that the district court did not abuse its discretion in finding that the NMB violated Fed. R. Civ. P. 11 by filing a repetitive motion.

BACKGROUND

On February 17, 1988 the International Brotherhood of Teamsters, Local 851 (hereinafter, along with appellant International Brotherhood of Teamsters Airline Division, "Union") filed an application with the NMB to investigate a dispute among certain employees of Virgin Atlantic Airways, Ltd. (Virgin). There had been talk of unionization among this group of workers for several months prior to this application.

Shortly after filing the application, the Union, along with several discharged Virgin employees, brought an action in federal court (the *Hodges* action) alleging that Virgin had unlawfully interfered with the right of the employees to select their own bargaining representative. The complaint alleged, among other things, that six employees had been discharged because they were vocal supporters of the Union. The discharged employees sought reinstatement. Two of the six were eventually

rehired by Virgin, but the remaining four did not work at Virgin after February 6, 1988.

The NMB proceeded to investigate the representation dispute among the Virgin employees. In March 1988 an NMB representative held a conference with Virgin and the Union. Virgin requested that the four plaintiffs in the *Hodges* action not be included among those employees eligible to vote in any election held to determine representation. Under an NMB rule, discharged employees with pending reinstatement actions are eligible to vote. *See* 29 C.F.R. § 1206.6 (1991). Virgin recognized this rule, but argued that the four should not be allowed to vote because the *Hodges* action was merely an attempt to take advantage of that rule rather than a bona fide reinstatement action. Virgin requested that the NMB stay its processing of the application until the district court ruled on the reinstatement claim.

By the end of March, the NMB representative had authorized an election among the employees and had included the four *Hodges* plaintiffs among those employees eligible to vote. The election was scheduled for April 25, 1988. The NMB representative explicitly informed the parties that they could appeal any decision of the representative to the NMB. Virgin did not appeal the decision to include the *Hodges* plaintiffs within the specified time.

On April 19, 1988 Virgin sent a telex to the NMB with two requests. First, Virgin noted that the trial in the *Hodges* case had been scheduled for the same date as the election and requested that the count be moved to the following day as Virgin wished its attorneys to be present at the vote count. Second, because the district court was expected to rule on the reinstatement claim promptly, Virgin requested that the challenged ballots be sequestered

and that, if those ballots proved determinative, the NMB postpone the count until the determination of the district court.

The NMB responded the next day with a telex to Virgin that stated: "Due to eligibility questions raised by telex of April 19, 1988 . . . the count of ballots . . . is postponed. Ballots received by the board . . . will be impounded at 2:00 p.m. on Monday, April 25, 1988 and counted at a later date after all questions of eligibility have been determined."

On April 26, 1988 the NMB again communicated with Virgin and reversed its earlier position. It informed Virgin that the votes would be counted on April 27 and that all ballots from those eligible to vote as of the original April 25 count date would be included. Citing similar determinations in other cases, the NMB denied Virgin's request for a delay in the count.

On April 27, 1988 the district court in the *Hodges* action held that the four employees had not been discharged because of their union activity and thus were not entitled to reinstatement. Virgin informed the NMB of this decision immediately and again requested that the votes of the four employees not be counted.

The NMB again denied this request and counted all the ballots. The Union received twelve of a possible twenty-one votes, including the four challenged votes. Thus, a majority of the eligible voters designated the Union as their representative. Had the four challenged ballots been excluded, the Union would not have had majority support. On May 2, 1988 the NMB certified the Union as the bargaining representative of the employees.

Despite the certification by the NMB, Virgin refused to bargain with the Union. Instead, Virgin solicited its employees to sign a prepared statement that read: "I have rethought my position regarding Virgin Atlantic and the Union and would like to collectively work with Management for one year after which time I would like the option of considering a Union to represent me."

After repeated overtures to Virgin to negotiate, the Union called a strike on July 6, 1988. Virgin again refused to negotiate with the Union at a mediation session on August 8, 1988 called at the direction of the NMB. The striking workers, led by the Union, then engaged in secondary picketing directed against United Airlines, a company that did business with Virgin. *See United Air Lines v. Airline Div., etc.*, 874 F.2d 110 (2d Cir. 1989).

On October 11, 1988 Virgin and six of its fleet service employees filed this action in the United States District Court for the Eastern District of New York against the NMB, the Union and others. They sought to set aside the certification, claiming that the NMB had grossly violated the RLA, had violated the First and Fifth Amendments to the Constitution and had violated the Administrative Procedure Act. Virgin also sought to enjoin picketing by the Union.

The Union filed a counterclaim against Virgin, seeking enforcement of the NMB certification and alleging that Virgin had violated the RLA by unilaterally altering the terms and conditions of employment. The Union also alleged that Virgin had impermissibly interfered with the employees' choice of a bargaining representative through the solicitation of signatures for the prepared statement.

The NMB moved to dismiss the complaint. The NMB argued that its actions in certifying a bargaining repre-

sentative were not subject to judicial review except where the NMB had "grossly violated" the terms of the RLA. The NMB argued that no such violation had occurred and therefore the district court could not review the certification. On February 24, 1989, after briefing and oral argument, the district court denied the NMB's motion to dismiss. The district court recognized the limited judicial review available for NMB certifications. However, the court held that, because the NMB counted the votes of individuals who were not "employees" for purposes of the RLA, there was jurisdiction to review the certification "[u]pon the precise facts of this case."

The parties agreed that the litigation should be stayed pending an interlocutory appeal of the denial of the motion to dismiss to this Court. After a delay, the district court entered an order pursuant to 28 U.S.C. § 1292(b) for an interlocutory appeal in February 1990. On March 15, 1990 we, in our discretion, declined to permit the interlocutory appeal to be taken and returned the matter to the district court.

On June 6, 1990 the NMB filed a motion styled as a "Resubmitted Motion to Dismiss, or in the Alternative, for Summary Judgment." That motion fundamentally relied on the same reasons the NMB had offered in its first motion to dismiss. After a hearing, the district court denied the motion on the basis of a local rule requiring that motions for reargument be made within ten days of the original decision and the law of the case doctrine. The district court imposed sanctions on the NMB under Rule 11 for filing what was essentially the same motion that the court had denied over a year earlier.

Virgin then moved for summary judgment and, after a hearing, the district court granted the motion in June

1991. The district court held that the NMB had "grossly violated" the RLA by counting the votes of the four challenged individuals. Therefore the district court held that the certification of the Union was invalid. The district court dismissed the Union's counterclaims and granted summary judgment to the NMB on Virgin's remaining claim that the certification violated the First and Fifth Amendments and the Administrative Procedure Act. Virgin, the Union and the NMB now appeal from the various determinations of the district court.

DISCUSSION

1. *The Certification*

The district court invalidated the certification on a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). That rule provides that a court should enter judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, the parties do not contend that any of the material facts are in dispute. The parties, however, disagree as to which of them is "entitled to a judgment as a matter of law."

The RLA provides that when there is a dispute between employees as to the identity of their representative the NMB should investigate and certify the identity of that representative. 45 U.S.C. § 152, Ninth. The jurisdiction of a federal court to review the certification of a bargaining representative by the NMB under the RLA has been held to be extremely limited. "The scope of judicial review and intervention is confined to 'instances of constitutional dimension or gross violation of the statute.'" *British Air-*

ways Board v. *National Mediation Board*, 685 F.2d 52, 55 (2d Cir. 1982) (citations omitted).

Virgin contends, however, that the NMB's actions are susceptible to more exacting judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. The district court correctly rejected this contention. By its terms, the judicial review provision of the APA does not apply if "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As we have stated before, " '[r]epresentation disputes,' which involve controversies surrounding the designation and authorization of representatives of employees covered under the RLA, are committed to the exclusive jurisdiction of the NMB." *Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 656 F.2d 16, 20 n.6 (2d Cir. 1981) (citations omitted). *See also Railway Clerks* v. *Employees Ass'n*, 380 U.S. 650, 658-60 (1965); *Switchmens' Union* v. *National Mediation Board*, 320 U.S. 297 (1943). Therefore, review of the certification is not available under the APA.

Thus, the certification here could properly be set aside only if the NMB grossly violated the RLA or violated some constitutional principle. The district court found that it had jurisdiction to review this certification because the NMB had grossly violated the terms of the statute. Virgin argues additionally that the certification violates the Constitution. We disagree with both contentions.

a. *Violation of the RLA*

As we noted in *British Airways*, "[i]nspection of the [RLA] reveals that there are relatively few commands capable of being violated." 685 F.2d at 56. Nonetheless, the district court found that the NMB had grossly violated

the statute by including in the representation election individuals who were not "employees" of Virgin.

Section 2, Ninth of the RLA provides that when a dispute arises among a carrier's employees as to the identity of their representative "it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify . . . the name or names of the [representative] designated and authorized to represent the employees." 45 U.S.C. § 152, Ninth. That section permits, but does not require, the NMB to "take a secret ballot of the employees involved." *Id.*

Section 1, Fifth, defines "employee" for purposes of the RLA as "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission." 45 U.S.C. § 151, Fifth. Virgin argues that, because a federal district court denied the challenged voters reinstatement, the NMB could not include them among the "employees" for purposes of the vote.

However it is the NMB, not the federal judiciary, that determines voter eligibility in elections held pursuant to the RLA. Section 2, Ninth of the statute explicitly states that "[i]n the conduct of any election for the purposes herein indicated *the Board shall designate who may participate in the election* and establish the rules to govern the election." 45 U.S.C. § 152, Ninth (emphasis added).

The NMB has established a regulation that governs the participation by discharged employees in representation elections. 29 C.F.R. § 1206.6 states, in pertinent part:

> Dismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

29 C.F.R. § 1206.6. Virgin claims that because the four dismissed employees' claims for reinstatement were no longer "pending" when the votes were actually counted, inclusion of their votes violated the regulation.

However, the NMB has a practice that "[w]hen the ballots in an election are impounded because of a question which requires resolution prior to the count, and the impounding results in a delay of the count beyond the count date . . . the status quo as it existed on the *original count date* must be preserved in order to prevent any change in the outcome as it would have been in the absence of the delay." *Altair Airlines*, 7 NMB No. 254 (1980) (emphasis added); *see also Continental Airlines*, 14 NMB No. 29 (1987); *Trans World Airlines*, 13 NMB No. 64 (1986). Nothing in 29 C.F.R. § 1206.6 or the RLA prohibits such a practice.

The NMB followed this practice here by, on April 27, counting the votes as they were on April 25, the original count date. On April 25, the four challenged voters had pending actions for reinstatement. Therefore, the NMB did not violate the regulation or the statute by counting the four ballots.

Moreover, a major concern of an NMB representation investigation is to "insure the choice of representatives by the employees *without interference, influence, or coercion*

exercised by the carrier." 45 U.S.C. 152, Ninth (emphasis added); *see Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 545-47 (1937). The NMB may properly use its power to designate participants in elections to counteract or prevent carrier influence in the choice of a representative by the employees. In *British Airways* for example, we refused to examine the propriety of a certification where the NMB held an election among employees two years after determining voter eligibility. 685 F.2d at 54-56.

Nothing in the RLA requires the NMB to stay elections pending resolution of a dispute over an allegedly wrongful discharge. Moreover, nothing in the statute mandates that, having once told the carrier that the election would be stayed, the NMB may not reverse its decision.

In short, the NMB did not violate any command of the RLA. Therefore, the district court erred in setting aside the certification on the ground that the NMB had grossly violated the statute.

b. *Constitutional Concerns*

Virgin claims that the certification violated its right to due process of law guaranteed by the Fifth Amendment because the NMB violated (1) its own internal procedures and (2) the regulations set forth in the federal register. "[I]t is clear that the internal procedures manual of an executive agency does not create due process rights in the public." *Lynch* v. *United States Parole Comm'n*, 768 F.2d 491, 497 (2d Cir. 1985). Thus, we need not address whether the NMB adhered to its internal procedures. However, an agency's violation of a federal regulation relating to it may constitute a violation of due process. *See Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Inter-*

national House v. *NLRB*, 676 F.2d 906, 912 (2d Cir. 1982). Virgin argues that, by counting the votes of four discharged employees, the NMB violated 29 C.F.R. § 1206.6. As noted above, the inclusion of the four challenged votes did not violate that regulation given the NMB's practice of maintaining the status quo in the face of delays in the count of votes. Therefore, the NMB did not violate Virgin's due process rights.

Several Virgin employees join Virgin in objecting to the NMB certification of the Union as the employee representative. These individuals claim that the certification violated their First Amendment right of free association. They claim that the First Amendment guarantees them the right not to be represented by a group chosen by less than a majority of their co-workers.

Not surprisingly, there is little support for such a proposition. The First Amendment right of free association has never been held to mandate "majority rule" in the labor relations sphere. If the First Amendment did protect individuals from being represented by a group that they do not wish to have represent them, it is difficult to understand why that right would cease to exist when a majority of the workers elected the union. *See Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956) (upholding "union shop" provisions of the RLA against First Amendment challenges); *International Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d 809, 812 (D.C. Cir.) (disenfranchised employees did not have a First Amendment claim), *cert. denied*, 488 U.S. 820 (1988). The district court properly held that the certification in this case did not violate the First Amendment rights of any individual employee.

The NMB, therefore, did not violate any constitutional provision in certifying the Union as the representative of the Virgin employees. Because the NMB neither grossly violated the RLA nor violated the Constitution, the district court did not have the authority to set aside the certification. *British Airways*, 685 F.2d at 55. The certification should be reinstated.

2. *The Union's Counterclaims*

The Union appeals from the district court's entry of summary judgment in favor of Virgin on the Union's counterclaims against Virgin. The Union asked the court for declaratory and injunctive relief, including a declaration that the NMB certification was valid, that Virgin's unilateral changes in working conditions and refusal to recognize the Union violated the RLA and that the strike against Virgin did not violate the RLA. The Union also asked the district court to order Virgin to bargain with the Union. In part because the district court held that the Union certification was invalid, the court dismissed these counterclaims.

As our discussion above indicates, the Union is entitled to a declaration that the certification is valid and that Virgin's refusal to bargain with the Union violated the RLA. As we stated with regard to this very situation in *United Air Lines*:

> [T]he RLA is unambiguous with regard to the carrier's obligation once the NMB transmits that certification to the employer:
>
> > Upon receipt of such certification the carrier *shall treat with* the representative so certified as the representative of the craft or class for the purposes of this chapter.

> 45 U.S.C. § 152, Ninth (emphasis added). Thus, the carrier, Virgin, had an absolute duty under section 152 Ninth to sit down at the bargaining table with the union.

874 F.2d at 115. That "absolute duty" remains unfulfilled to this day and the Union is entitled to a declaration and an injunction to enforce that duty.

The Union also claims that Virgin violated section 2, Third and Fourth. Section 2, Third provides, in pertinent part, that "no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier." 45 U.S.C. § 152, Third. Section 2, Fourth similarly prohibits employer interference in the selection of employee representatives. *Id.* § 152, Fourth. In support of this counterclaim, the Union asserts that Virgin discharged employees who were engaged in a strike designed to enforce the NMB certification and solicited employees to sign a prepared statement repudiating the Union. These actions, if proven, constitute interference by the carrier with the employees' selection of a representative. *See NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (increase in benefits, if undertaken to discourage support for union, unlawful under the National Labor Relations Act (NLRA)); *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 883 (2d Cir. 1977) (Under NLRA, coercion normally may be inferred from the fact that supervisors are involved in soliciting signatures on anti-union petitions); *cf. Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969) (cases construing NLRA may be helpful in construing similar provisions of RLA). The counterclaim states a claim for violation of 45 U.S.C. § 152, Third and Fourth. Therefore, the district

court should not have summarily dismissed this counterclaim.

The Union further alleges that Virgin, by unilaterally altering rates of pay, violated section 2, First and Seventh of the RLA, 45 U.S.C. § 152, First and Seventh. Section 2, First imposes a general duty on carriers to "exert every reasonable effort" to make agreements concerning working conditions. 45 U.S.C. §152, First. Section 2, Seventh states, in pertinent part:

> No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Id. § 152, Seventh. Section 156 of Title 45, section 6 of the RLA, in turn requires that carriers and representatives give each other thirty days written notice of "an intended change in agreements affecting rates of pay, rules, or working conditions."

As the district court recognized, the Supreme Court has held that the phrase "as embodied in agreements" limits this provision of the act to agreements reached after collective bargaining. *Williams* v. *Terminal Co.*, 315 U.S. 386, 399-400 (1942). In *Williams*, the plaintiffs, employees who had never engaged in collective bargaining with their employer, tried to halt unilateral changes in working conditions by the employer. At the time of the unilateral change in working conditions, one group of plaintiffs had authorized a representative under the RLA. That representative had, prior to the change, requested to bargain with the employer. The Court held that nothing in the RLA prevented changes prior to the actual existence of a collective bargaining agreement:

> The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions *previously fixed by collective bargaining agreements*. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.

Id. at 402-03 (emphasis added).

The Supreme Court cast some doubt on the vitality of *Williams'* interpretation of section 2, Seventh in *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969). However, as the D.C. Circuit stated when faced with a similar problem, the *Detroit & Toledo* decision "plainly stops short of overruling *Williams* and leaves it binding in a case like the one before us where there has been 'absolutely no prior history of any collective bargaining or agreement between the parties on any matter.' " *Trans World Airlines*, 839 F.2d at 814 (citation omitted).

Although some courts have held that something less than a formalized collective bargaining agreement may be sufficient to trigger the status quo provisions of the RLA, *see International Ass'n. of Machinists* v. *Transportes Aereos Mercantiles*, 924 F.2d 1005, 1008-10 (11th Cir.) (unratified agreement represented status quo), *cert. denied*, 112 S.Ct. 167 (1991), here there was not even that. The Union and Virgin never bargained with each other. Therefore, section 2, Seventh, does not apply.

Similarly, where no steps toward bargaining have been taken, the unilateral alteration of rates of pay by an

employer does not violate the section 2, First duty to "exert every reasonable effort" to make agreements. *See Regional Airline Pilots* v. *Wings West Airlines*, 915 F.2d 1399, 1402-03 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2891 (1991); *Trans World Airlines*, 839 F.2d at 814-15. The district court properly dismissed this counterclaim under this provision of the RLA.

3. *Rule 11 Sanctions*

In February 1989 the NMB made a motion to dismiss Virgin's action to set aside the Union certification. In that motion, the NMB argued that the district court did not have jurisdiction to review the certification, citing many of the cases and principles discussed above. The district court denied the motion. The district court recognized the limited nature of judicial review in this context, but held that on the precise facts of this case there was jurisdiction to review the certification.

Approximately sixteen months after the original motion to dismiss was denied by the district court the NMB filed what it characterized as a "Resubmitted Motion To Dismiss, or in the Alternative, For Summary Judgment." In its memorandum supporting that motion, the NMB argued that the principles that it had argued in its original motion had been "reaffirmed" by intervening case law.

The NMB argued that their motion was justified by Fed. R. Civ. P. 54(b), which provides, in pertinent part, that, unless the court expressly directs otherwise, any order or decision "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). The NMB asserted that this provision impliedly

allows motions requesting that the court reverse one of its earlier decisions.

The district court denied the motion. It held that the motion was in reality a motion to reargue the prior motion. As such, the motion was barred by a local rule that provided that such motions must be made within ten days. The district court held that the motion also should be denied based on the law of the case doctrine. It found that there was no significant new law presented in the motion. The district court found that the motion merely rehashed principles with which the court was familiar and that it had considered at the time of the first motion. The district court also held that the NMB's theory under Rule 54(b) was totally without merit.

In addition, the district court rejected the NMB's asserted reason for filing the motion. The NMB stated at oral argument before the district court that the reason for the motion was to place the case in a posture that would allow for an appeal. The court concluded that, because the NMB had repeatedly objected to entry of summary judgment for Virgin—a device that would have allowed for an appeal to this court—the NMB was insincere in its avowed reason for the motion.

The district court therefore held that that motion violated Fed. R. Civ. P. 11 (Rule 11) and ordered the NMB to pay the reasonable costs incurred by Virgin in opposing the motion. Rule 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of

> existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11. The district court held that the filing of the motion was not justified by existing law or by a good faith argument for extension, modification or reversal of existing law. The court stated: "The reasons upon which the court based its denial of the motion were patent. Local Rule 3(j) and the law of the case doctrine, each of which was readily discoverable, would have counseled against the filing of this motion."

The NMB contends that the district court erred in finding that it violated the strictures of Rule 11 by making its second motion to dismiss. In reviewing the imposition of sanctions under Rule 11, "an appellate court should apply an abuse-of-discretion standard" to every aspect of the district court's ruling. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990). However, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

The NMB argues that because, as we hold today, it was correct on the merits of its motion to dismiss, the finding that the motion violated Rule 11 was an abuse of discretion. However, the district court did not impose sanctions on the NMB for the substance of its motion. The district court found that the NMB violated Rule 11 because making the motion *at that juncture in the case*, given Local Rule 3(j) and the law of the case doctrine, was not justified by existing law or a good faith argument for the extension, modification or reversal of existing law. Therefore, the fact that the NMB was correct on the merits of

its motion does not mandate a determination that the Rule 11 sanctions constituted an abuse of discretion.

Although we hold today that the district court erred in denying the NMB's initial motion to dismiss, it was justified in denying the resubmitted motion based on the law of the case doctrine. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[4.—1], at 124-26. Similarly, the district court was within its discretion in characterizing the NMB's "resubmitted" motion to dismiss as in reality a motion for reargument and thus barred as untimely under Local Rule 3(j).

The law of the case doctrine is admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment. *See Arizona* v. *California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); *First Nat'l Bank of Hollywood* v. *American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir.) ("In this Circuit, the law of the case is a discretionary doctrine that need not be applied when no prejudice results from its omission.") (citation omitted), *cert. denied*, 429 U.S. 858 (1976). However, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790. *Accord*, *Doe* v. *New York City Dep't of Social Services*, 709 F.2d 782, 789 (2d Cir.) (discussing law of the case in the appellate context), *cert. denied*, 464 U.S. 864 (1983). The district court explicitly

found that none of those reasons was present in this case. Even if Rule 54(b) allows parties to request district courts to revisit earlier rulings, the moving party must do so within the strictures of the law of the case doctrine.

Given the deferential standard of review we must use in reviewing all aspects of a district court's imposition of Rule 11 sanctions, we cannot say that the court abused its discretion in finding that the NMB's position in making its motion was not justified. Judge Glasser's prior decision emphasized that there was jurisdiction to review the certification "[u]pon the precise facts of this case." None of the intervening cases cited in the NMB's memorandum supporting the resubmitted motion addressed the "precise facts of this case," or even closely similar facts. Judge Glasser's initial error in asserting jurisdiction was not so clear that the law of the case doctrine would be justifiably ignored. The imposition of the Rule 11 sanctions, therefore, was not an abuse of discretion.

CONCLUSION

Because the procedures used by the NMB in determining the identity of the bargaining representative of the contested group of Virgin employees neither grossly violated the RLA nor raised any constitutional concerns, the district court had no power to review the certification of the Union in this case. The district court, therefore, also improperly dismissed some of the Union's counterclaims. Because there was no prior history of collective bargaining between the parties, however, the district court correctly concluded that Virgin's unilateral change in the terms and conditions of employment did not violate 45 U.S.C. § 152, Seventh. Moreover, the imposition of sanctions against the NMB for its resubmitted motion, given

the court's prior narrow ruling on that subject, the local rule relating to reargument and the law of the case doctrine, was not an abuse of discretion and thus we affirm the imposition of those sanctions.

We therefore reverse the district court's invalidation of the NMB certification of the Union as the representative of the employees at issue here. With the exception of the dismissal of the Union's counterclaim under 45 U.S.C. § 152, Seventh, we reverse the dismissal of the Union's counterclaims. We affirm the imposition of sanctions against the NMB under Rule 11. We vacate the judgment and remand to the district court for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-88-3163 (ILG)
Filed June 24, 1991

VIRGIN ATLANTIC AIRWAYS, LTD, et al.,

Plaintiffs,

v.

NATIONAL MEDIATION BOARD, et al.,

Defendants.

JUDGMENT AND ORDER

GLASSER, United States District Judge:

This Court heard oral argument on plaintiffs Virgin Atlantic Airways, Ltd., Mario Batista, Lawrence French, Jose Marcello Garcia, John Aquino and Edgar Lambertus' Motion for Summary Judgment on May 10, 1991. This Court also considered plaintiffs' Motion to Dismiss the counterclaims of defendants Local 851, Anthony Farina, International Brotherhood of Teamsters Airline Division and William Genoese (collectively "union defendants"). Based upon the papers filed in connection with plaintiffs' motions, the statements made at oral argument, the papers filed in connection with the National Mediation Board's ("NMB") two Motions to Dismiss or, in the Alternative, for Summary Judgment, filed on December 19, 1988 and June 5, 1990, and statements made at oral arguments on February 24, 1989 and July 20, 1990, it is hereby ORDERED that:

1) Upon the precise facts of this case, this Court has jurisdiction to review the defendant NMB's certification of the union;

2) Summary judgment is granted for plaintiffs on the issue of this Court's jurisdiction because the Court finds, for reasons it stated upon the record at the oral arguments on February 24, 1989 and July 20, 1990, that defendant NMB's certification of the union as the bargaining representative grossly violated the Railway Labor Act;

3) The NMB's May 2, 1988 certification in NMB Case Number R-5768 is null and void;

4) The union defendants' counterclaims are dismissed for the reasons stated by the Court during oral argument on May 10, 1991;

5) Plaintiffs' claims that the certification is invalid due to alleged *ex parte* contacts between the NMB and union defendants and that the certification violated the employees' Fifth Amendment right to equal protection, both of which plaintiffs withdrew in their May 7, 1991 Reply Brief, are dismissed with prejudice;

6) Summary judgment is granted for defendant NMB on plaintiffs' claims that the certification violated the employees' First Amendment rights to freedom of association and that the NMB's actions violated the Administrative Procedure Act;

7) The Court considered, but finds it unnecessary to decide, plaintiffs' alternative claim that the certification violated the employees' Fifth Amendment rights to due process because the Court has already determined that the certification is null and void since it constituted a gross violation of the Railway Labor Act;

8) Pursuant to the Court's October 16, 1990 Order, plaintiffs are awarded sanctions in the amount of $8,731.99, *i.e.*, $7,801.25 in attorneys' fees and $930.74 in other expenses. The NMB's obligation to make this payment is stayed pending appeal. If the United States Court of Appeals for the Second Circuit affirms this Court's decision regarding sanctions, the National Mediation Board shall pay plaintiffs interest

from the date of this Order at a rate as established in 28 U.S.C. § 2516(b); and

9) This constitutes a final judgment pursuant to Rules 54 and 56, Federal Rules of Civil Procedure. Judgment shall be entered immediately upon the filing of this Order.

SO ORDERED,

/s/ I.L. GLASSER
United States District Judge

Dated: Brooklyn, New York
June 14, 1991

[LETTERHEAD OF THE NATIONAL MEDIATION BOARD]

15 NMB No. 55
CASE NO. R-5768
May 2, 1988

In the Matter of the

REPRESENTATION OF EMPLOYEES

of

VIRGIN ATLANTIC AIRWAYS

Fleet Service Employees

CERTIFICATION

The services of the National Mediation Board were invoked by the International Brotherhood of Teamsters-Airline Division (IBT), on February 8, 1988, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Fleet Service Employees", employees of the Virgin Atlantic Airways.

At the time this application was received, these employees were not represented by any organization or individual.

The Board assigned Board Representative Gale L. Oppenberg to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Fleet Service Employees, and by direction of the Board the Board Representative was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Board Representative William A. Gill, Jr., who was assigned to count the ballots in this case.

Number of Employees Voting:

	IBT	Number of Employees Eligible
Fleet Service Employees	12	21

The National Mediation Board further finds that the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the International Brotherhood of Teamsters-Airline Division has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Fleet Service Employees, employees of the Virgin Atlantic Airways.

By direction of the NATIONAL MEDIATION BOARD.

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

CRB/dsa

RAILWAY LABOR ACT, 45 U.S.C. §§ 151-188

Section 1. Fifth [45 U.S.C. § 151, Fifth]

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

Section 2. Third Designation of representatives. [45 U.S.C. § 152, Third]

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Section 2. Fourth Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. [45 U.S.C. § 152, Fourth]

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during work hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2. Ninth Disputes as to identity of representatives; designation by Mediation Board; secret elections. [45 U.S.C. § 152, Ninth]

If any dispute shall rise among a carrier's employees as to who are representatives of such employees designated and authorized in accordance with the requirements of this chap-

ter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

RULES OF THE NATIONAL MEDIATION BOARD
29 CFR Parts 1200-1209

Section 1206.6 Eligibility of dismissed employees to vote. [29 CFR 1206.6]

Dismissed employees whose requests for reinstatement on account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

REPRESENTATION MANUAL
TABLE OF CONTENTS*

SECTION		PAGE NO.
*1.0	INITIAL NMB PROCESSING	1
2.0	NOTICE OF INTEREST	1
3.0	BOARD REPRESENTATIVE'S INVESTIGATION	1
3.1	Board Representative's Objectives	1
3.2	Intervention	2
3.3	Review & Maintenance of Loan File	2
3.4	Board Representative's Reports	2
3.401	Daily	2
3.402	Initial Report Form	2
3.5	Meeting With Representatives	3
3.501	General Guidelines	3
3.501-1	Method of Contact	3
3.501-2	Type of Meeting	3
.502	Meeting With Employee Representatives	3
3.503	Meeting With Carrier Representatives	4
3.503-1	Access to Books and Records	4
3.503-2	Preliminary Information	4
3.503-3	Carrier Status	4
3.503-4	List of Potential Eligible Voters	5
*3.503-5	Cut-Off Date	6
4.0	DISTRIBUTION OF LIST OF POTENTIAL ELIGIBLE VOTERS	6
5.0	PRELIMINARY DETERMINATIONS	6
5.1	Craft or Class	6
5.2	Classifications	7
5.3	Eligibility of Individuals	7

* Indicates Section amended by Board on November 1, 1985.

5.301	Part Time Employees	7
5.302	Temporary Employees	8
5.303	Working in Another Craft or Class	8
5.304	Discharged Employees	8
5.305	Furloughed Employees	8
5.306	Leave of Absence	9
5.307	Probationary Employees	9
5.308	Working for Another Carrier	9
5.309	Contractor's Employees	9
5.310	Individuals Based in Foreign Countries	9
5.311	Retired Employees	10
5.312	Officials	10
5.313	Preponderance	10

* * *

NATIONAL MEDIATION BOARD REPRESENTATION MANUAL

Revised Edition—Effective November 1, 1985

5.0 PRELIMINARY DETERMINATIONS

The Board representative should make preliminary determinations regarding craft or class and inclusion of individuals on the eligibility list before evaluating the showing of interest. In so doing the Board representative should be guided by the following principles:

* * *

5.3 Eligibility of Individuals

* * *

5.304 Discharged Employees

Ordinarily, discharged or terminated employees shall not be considered eligible unless the discharge is being appealed through the applicable grievance procedure or an action for reinstate-

ment has been filed before a court of competent jurisdiction. An individual shall not be considered eligible if the grievance or court action has been finally acted upon and the discharge has been upheld prior to the count of ballots (see NMB Rules, Part 1206.6).

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

88 Civ. 3163 (ILG)

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO and EDGAR LAMBERTUS,

Plaintiffs,

—against—

NATIONAL MEDIATION BOARD, an agency of the UNITED STATES OF AMERICA; LOCAL 851, International Brotherhood of Teamsters; ANTHONY FARINA, individually and as President of Local 851; INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION; and WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Defendants.

AFFIDAVIT OF MICHAEL DELIKAT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

Michael Delikat, being duly sworn, deposes and says:

1. I am a member of the firm of Baer Marks & Upham, counsel for Plaintiffs in this matter. I submit this Affidavit and the attached documents in support of Plaintiffs' Motion for Summary Judgment.

2. Since 1988, I have served as counsel for Plaintiff Atlantic Airways, Ltd. ("Virgin Atlantic" or "Virgin") in connection with the events that form the basis of this lawsuit—the

representation dispute involving the fleet service employees of Virgin Atlantic, and the lawsuit entitled *Hodges et al. v. Virgin Atlantic*—and thus, am fully familiar with the matters set forth herein.

3. In February, 1988, the International Brotherood of Teamsters Airline Division ("Teamsters Airline Division") filed an application with the National Mediation Board ("NMB") for investigation of a representation dispute.

4. Within days after filing the Application for Investigation of Representation Dispute, Local 851 of the International Brotherhood of Teamsters ("Local 851") and six former employees of Virgin, commenced an action in the United States District Court for the Southern District of New York, in the matter entitled *Hodges et al. v. Virgin Atlantic Airways, Ltd.*, 88 Civ. 1370 (LLS) claiming, *inter alia*, that Virgin Atlantic, a United Kingdom Corporation offering air service between London and the United States, had terminated six employees in retaliation for their support of Union representation. The action sought, *inter alia*, reinstatement of five of the six named individuals (one of the individuals had been reinstated prior to the commencement of the action).

5. Virgin Atlantic denied the material allegations of the *Hodges* complaint, asserting that the terminations, which occurred in the context of other employees being laid off in a reduction force, were done for reasons having nothing to do with union activity.

6. By commencing this action for reinstatement, Local 851 was able to obtain the necessary showing of interest to proceed to an election, as the authorization cards of the discharged workers with an action for reinstatement pending were counted.

7. After denying a request by the *Hodges* plaintiffs for a preliminary injunction, the district court granted Virgin Atlantic's request to consolidate the trial on the merits with the hearing on the preliminary injunction application and ordered expedited discovery.

8. Virgin Atlantic's request for an expedited disposition of the matter was based upon the NMB Rule that individuals with pending actions for reinstatement were eligible to vote and the fact that the inclusion of the four discharged individuals (one of the five individuals seeking reinstatement was ruled ineligible for reasons unrelated to the case, thereby leaving *four* disputed ballots) could have an outcome determinative impact on the election since the "unit" of employees voting was less than twenty without these four.

9. The *Hodges* Court set April 25, 1988 as the date for the trial on the merits and, aware of the significance of determining the status of the discharged individuals as quickly as possible, announced that the Court would rule upon the claims for reinstatement at the conclusion of the evidence.

10. The NMB also set April 25, 1988 as the date for counting the ballots.

11. On April 19, by telex to the NMB with a copy to Local 851, Virgin Atlantic requested that the ballots of the discharged individuals not be counted until such time as the *Hodges* Court had determined whether or not such individuals should be reinstated to their former positions of employment. A copy of Virgin's April 19 telex is attached hereto as Plaintiffs' Exhibit 1.

12. By telex dated April 19, 1988 to the parties, the NMB granted the request for postponement of the April 25 count dated until "a later date after all questions of eligibility have been determined." A copy of the NMB's April 19 telex is attached hereto as Plaintiffs' Exhibit 2.

13. The *Hodges* court heard evidence on April 25 and concluded the trial of that action on April 26. That same day the NMB issued yet another decision by telex announcing that it would count "all ballots of eligible employees" at 2 o'clock p.m. on Wednesday, April 27. A copy of the NMB's April 26 telex is attached hereto as Plaintiffs' Exhibit 3.

14. No reference was made in the April 26 telex to the NMB's April 19 ruling that the count would be delayed until

"a later date after all questions of eligibility have been determined."

15. On April 27, 1988, at 11:30 a.m., the *Hodges* Court announced its decision dismissing the claims for reinstatement in their entirety and advised counsel that they could advise the NMB that "by my order entered on the record this morning, the individual claims for reinstatement and backpay are dismissed." The NMB was immediately advised by telephone and telex of this outcome. A copy of the portion of the trial transcript announcing this decision is attached hereto as Plaintiffs' Exhibit 4.

16. At 2 o'clock p.m. on April 27, after again being advised of Judge Stanton's decision to deny the requests for reinstatement of the four discharged individuals (as counsel for Virgin Atlantic, I was present at the ballot count), the NMB counted the ballots. Twelve ballots, *including* the four in contention, were cast for the Teamsters Airline Division. The NMB ruled that there were twenty-one eligible voters, including the four in contention. A copy of Virgin's April 27 telex to the NMB is attached hereto as Plaintiffs' Exhibit 5.

17. According to the NMB's determination, twelve out of twenty-one, or a majority, cast ballots for representation. If the four ballots had *not* been counted, the Union would have received eight votes out of *seventeen* eligible votes and would therefore *not* have obtained a majority.

18. On May 2, 1988, the NMB, on the basis of the disputed tally, issued a certification of the Teamsters Airline Division as the representative for purposes of the Railway Labor Act of the "employees" of Virgin Atlantic (the "Certification").

19. On or about October 16, 1988, Virgin Atlantic and several of its employees commenced the instant action seeking to set aside the Certification on the grounds that the NMB had committed a violation of the Railway Labor Act by including the ballots of the four non-employees in the ballot

count in disregard of the *Hodges* Court's ruling denying said individuals' claims for reinstatement.

20. Attached hereto as Plaintiffs' Exhibit 6 is a copy of the Notice and Rules of Election posted by Virgin Atlantic in connection with the election.

21. Attached hereto as Plaintiffs' Exhibit 7 is a copy of the decision in *Northwest Airlines*, 14 N.M.B. 25 (1986).

22. Attached hereto as Plaintiffs' Exhibit 8 is a copy of the decision in *Rich Airlines*, 14 N.M.B. 171 (1987).

23. Attached hereto as Exhibit 9 is a copy of pp. 55-58 of the Transcript of Motion dated February 24, 1989.

24. Attached hereto as Plaintiffs' Exhibit 10 is a copy of this Court's Amended Memorandum and Order dated March 1, 1989.

25. Attached hereto as Plaintiffs' Exhibit 11 are copies of the district court and Ninth Circuit Court of Appeals decisions in *Union of Flight Attendants, Local No. 1 v. Air Micronesia*, Civil No. 85-0125 HMF (D. Hawaii August 30, 1988), *aff'd*, (9th Cir. May 10, 1990).

26. Attached hereto as Plaintiffs' Exhibit 12 is a copy of the decision in *Union of Flight Attendants, Local No. 1 v. Continental Airlines*, Case No. 88-3517 DT (C.D. Cal. August 25, 1988).

27. Attached hereto as Plaintiffs' Exhibit 13 is a copy of the Complaint in the instant action.

28. Attached hereto as Plaintiffs' Exhibit 14 are copies of the Answers and Counterclaims of Defendants Local 851 and Teamsters Airline Division.

/s/ MICHAEL DELIKAT
MICHAEL DELIKAT

Sworn to before me
this 7th day of March, 1991

/s/ RUTH D. RAISFELD
Notary Public

[NOTARY SEAL]

[EXHIBIT 2]

7105812780,
/ZIP
WILLIAM GENOESE DIR
NATIONAL AIRLINE DIVISION
IBT
15 EAST 26TH STREET SUITE 1508
NEW YORK NY 10010,
/FORM
FAX 212-966-9706+

APR 19 4:42 PM '88
NATIONAL MEDIATION
BOARD

MICHAEL DELIKAT
COUNSEL FOR VIRGIN ATLANTIC AIRWAYS

STEPHEN KAHN
COUNSEL FOR IBT

DUE TO ELIGIBILITY QUESTIONS RAISED BY TELEX OF APRIL 19, 1988 FROM BAER, MARKS AND UPHAM, ATTORNEYS FOR VIRGIN ATLANTIC AIRWAYS THE COUNT OF BALLOTS IN NMB CASE R-5768 VIRGIN ATLANTIC AIRWAYS FLEET SERVICE EMPLOYEES AND IBT SCHEDULED IN THE OFFICES OF THE NATIONAL MEDIATION BOARD, WASHINGTON, DC AT 2:00 P.M. ON MONDAY, APRIL 25, 1988 IS POSTPONED. BALLOTS RECEIVED BY THE BOARD IN NMB CASE R-5768 WILL BE IMPOUNDED AT 2:00 P.M. ON MONDAY, APRIL 25, 1988 AND COUNTED AT A LATER DATE AFTER ALL QUESTIONS OF ELIGIBILITY HAVE BEEN DETERMINED. YOU WILL BE INFORMED OF THE NEW DATE OF COUNT WHEN IT HAS BEEN SCHEDULED. ADDITIONALLY YOU MAY IF YOU WISH BE PRESENT WHEN THE BALLOTS ARE IMPOUNDED. JOINT KAHN, DELIKAT AND GENOESE. MAIL COPY TAIT, BOMPHY, LIEBMAN, OPPENBERG AND STROM.

CHARLES R. BARNES, EXEC DIR, NATIONAL
MEDATION BOARD
TLX 89-2710 (DR/AK237)

[EXHIBIT 4]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 1370 LLS

RICHARD HODGES, et al.,

Plaintiffs,

v.

VIRGIN ATLANTIC AIRWAYS, LTD.,

Defendant.

April 27, 1988
11:00 a.m.

Before:

HON. LOUIS L. STANTON,

District Judge

APPEARANCES

STEPHEN H. KAHN,
Attorney for Plaintiffs

BAER MARKS & UPHAM
Attorneys for Defendant
MICHAEL DELIKAT,
Of Counsel

(Trial resumed)

THE COURT: The court set this down today for announcement of its findings and decision, and these findings and conclusions may later be amended or supplemented by the court, but not in such a manner as to change their basic tenor.

Either side may submit proposed amendments or supplemental findings or conclusions within ten days.

From my observation of the witnesses, their testimony, documentary evidence and the submission of counsel, I find that the preponderance of the credible evidence establishes that:

1. Richard Hodges, Charles L. James, William Nicholson, Juan Plaza and Jose Soto are individuals residing in the State of New Jersey. They were employed by defendant Virgin Atlantic Airways, Ltd. in its Virgin Atlantic Cargo Division at its Newark, New Jersey facility in the position of freight agents until their employment was terminated on or about February 6, 1988. One or two weeks after that plaintiff Soto was rehired.

2. Plaintiffs James and Nicholson were hired in July and August 1987 to help Virgin Atlantic with its then increasing volume of work. In August 1987 Virgin Atlantic was expanded to a 24 hour operation. Its new customer, Summit Airlines, needed service around the clock and Virgin Atlantic used the opportunity to reschedule some of its other work as well.

One of the reasons William Nicholson as hired was his prior experience with Summit work during his earlier employment with Serv Air. Nicholson worked the night shift, and 50 to 60 percent of this time was spent on Summit work.

3. Reports and rumors of union activity were frequent at Virgin Atlantic. The major carriers are unionized so discussion of the topic of union organization was not unusual. Management was aware of that fact and was not disturbed by it although management did not favor unionization.

4. In November or December 1987 Jose Soto talked with several of the other employees about joining a food handlers union. No attempt was made to speak secretly. The talk died down quickly.

Several of the employees believed that Colin Tubb, a Virgina Atlantic officer, had summoned Julio Rosa to his office and asked him about the union, asked him which

employees were involved and why they felt a union might be desirable.

Nicholson testified that that was perceived as a threat, but there is no evidence that whatever Tubb said on that occasion discouraged or dissuaded anyone from being interested in the Teamsters organizing effort in January 1988.

5. The Teamsters effort to organize in January 1988 was discussed openly among the employees who made no effort to hide their actions. Indeed, Nicholson discussed it freely with two co-employees whom he believed to be supervisors. There is no evidence of any discouragement or interference by any member of management at any time with respect to that organizational effort except for a single speech given by Angelo Pusateri to a group of eight to ten employees at the warehouse on February 4, 1988.

6. When Pusateri spoke to the men on February 4 he was aware of the following facts:

A. He knew that between August and the end of December 1987 Virgin Atlantic had lost three of its five largest outside customers. It had lost SMB, which because of an air crash was not using Newark Airport anymore; it had lost Highland Express which was in an English equivalent of Chapter XI proceedings; and it had lost UPS which had obtained customs clearance to handle overseas air freight out of its own facility. Of Virgin Atlantic's previous five major customers, this left only Summit and Air France.

Summit itself had been the biggest of Virgin Atlantic's outside customers, responsible for a third of total cargo tonnage Virgin Atlantic handled. Summit was billed monthly and by January 15, 1988 it was approximately $60,000 in arrears.

B. He knew that the Newark operation had started incurring losses in October, that it was necessary to cut expenses and that payroll should be reduced by 10 employees, a point on which Pusateri had been stalling because if he kept the Summit business he would need those employees to handle it.

C. He knew that the Summit business was in peril. He had learned on that morning of February 4 that Summit intended to change a different cargo agent within a short time, and he had responded that Virgin Atlantic would stop handling Summit's business at the end of the following day if Summit did not make payment. He had done that in the hope that Summit would make that payment in order to continue its business and facilitate its transfer to its new agent. However, on February 4 Pusateri had no answer from Summit and did not know what they would do.

And D, he knew that the employees at the warehouse were upset about the delays and the computation of their overtime and did not understand their shifts and benefits. He had been told that the situation was ripe for a union.

Although he had no knowledge of any particular union activity, he knew that a teamster representative had been talking to the men on the premises recently.

At the suggestion of Mr. Piol, Mr. Pusateri spoke to the group of men who were in the warehouse on February 4. He said that he had heard there were a lot of problems in the terminal, that they were unhappy with the pay and thought the company was cheating them on overtime and did not understand the shifts or their benefits. He explained personnel changes in the company. Mr. Tubb was gone and Carmel Marnel, the new personnel manage., was preparing a manual listing the benefits which Pusateri pointed out were expensive and he felt the men would appreciate when they understood them.

He said he understood there was talk about a union. He said that he believed a union would not solve their problems, that they could form a committee and their spokesman could come to him and that he had been a union shop steward and knew how that worked and didn't think it was so great.

He said that if faced with outrageous demands from a union, the company had the option of farming out the business as it had done when Virgin Atlantic was started.

He said they were having payment problems with Summit but that he did not expect major layoffs and hoped for new business and that they could work the problem out.

He also pointed out that they paid a good salary scale, higher than their competitor, CDG.

He asked what would make the company run smoother. Julio Rose mentioned lockers, improved heating and a microwave oven. Pusateri said that he would look into it.

Mr. James didn't find this a satisfactory answer because Pusateri didn't say when anything would be done.

Pusateri maintains that he made no threat to terminate anyone who affiliated with a union. And in light of his union background and my observation of him as a witness during a trial day of direct and cross-examination, I credit that testimony.

However, his statement about farming out the work was interpreted as a threat to their employment by at least some of the employees. Nevertheless, all of the employees disregarded the threat and continued undeterred with their union activities with the single exception of Julio Rosa who asked for the return of his union authorization card. In fact, Hodges said to James that Pusateri was full of baloney and James agreed.

7. The following day Pusateri learned that no payment had been made by Summit and decided that it was necessary to eliminate the night shift and discharge ten people as well as cutting their costs. He instructed the duty managers to discharge ten people.

It was not Pusateri who selected who should be cut. In fact, the discharge of ten people was excessive and left Virgin Atlantic unable to handle the work.

On the managers' complaints that too many had been let go, Jose Soto was hired a week or two later before the commencement of this suit and Michael Wilson and Roland Casey have since been rehired.

8. Alistair Bell and the other duty managers decided who would be discharged based on performance, attendance and

seniority. Specifically the plaintiffs were discharged for the following reasons:

Charles James because he had arrived late and was absent without notification and twice left from work without telling anyone and without punching out.

Jose Sote because he had some absenteeism, although it was not as bad as some of the others.

Richard Hodges because he had made inacurrate freight counts and weighings which created some problems. He had arrived late on several occasions. He had been reduced from checker to cargo agent. Once he had been sent home from work for refusing to help with work as requested.

William Nicholson because of his history of lateness. He was part of the third shift, which was to be eliminated. His overall performance was poor, and he had been primarily hired in connection with Summit work.

Juan Plaza had a history of no shows, especially around weekends. He had no home telephone so he could not be reached when they needed extra help and did not call in.

Mr. Bell was unaware of any union activity by any of the named plaintiffs and the presence or absence of such activities by any person on the list played no part in Bell's selection of their names. There is no evidence that such activities were discussed by Bell, Pauletti and Williams in deciding who should be discharged.

9. Mr. Kane was a leader of the Teamsters organizing drive. Mr. Butters handed out a card. Mr. Insalacco, Mr. Velazquez and Mr. Spencer all favored the union. None of them were laid off.

Jose Soto was the leader of the food workers organization drive and although he was laid off, he was the first rehired before this suit was commenced.

On the other hand, there is no evidence of particular union organizing activity on the parts of Michael Wilson, Roland Casey, Mary Insalacco, Elizabeth Robles, all of whom were laid off. There is no evidence that any employees who were retained had worse performance records than those who were

fired. Thus, there is no overall pattern of union discrimination which emerges from the ten discharges.

On those facts I reach the following conclusions:

1. The individual plaintiffs were not fired for union activity.

2. Even if union considerations had entered into the decision to terminate the employees, the decisions would have been made in any event and reinstatement would not be required under the mixed motive doctrine.

3. Mr. Pusateri's speech to the men was not an unlawful solicitation of grievances. The employees suggested lockers, improved heating and a microwave oven. Pusateri did not promise to remedy any of their grievances but only said that he would have the situation looked into.

4. Mr. Pusateri's statement that Virgin Atlantic had the option to farm business out as had been done in the past, however innocently intended, was reasonably interpreted as a threat affecting the continued employment of the labor force. Either separately, or together with statements made to him by Colin Tubb in connection with the food handlers union organization, these statements were sufficient to persuade Julio Rosa to request return of his authorization card, and whether separately or together, the effect of those statements was to influence Mr. Rosa, and that is chargeable to the employer.

Plaintiff Soto has standing to raise that point.

Accordingly, the plaintiffs' claims for reinstatement and for back wages are dismissed; the application for an order that a corrective notice be posted is granted.

The parties are directed to submit a proposed form of judgment on consent, if possible. If the parties cannot agree as to the form of the notice or the duration or location or locations where it should be posted, they may apply to the court within 15 days for its resolution of such matters.

Does either counsel have anything further?

MR. DELIKAT: Yes, your Honor, thank you.

I have prepared a short form order which partially embodies your findings of fact and conclusions of law, the reason being I am about to catch a plane for Washington for the ballot count at 2:00 today.

I would propose to show that to Mr. Kahn and propose to submit that to the court.

I will read it. It says:

Proposed Order.

Whereas, the trial on the merits of within action was held on April 5 and 26, 1988;

Whereas the court has this day announced its findings of fact and conclusions of law which may hereafter be amended or supplemented by the court;

Now therefore it is hereby ordered that the individual claims for reinstatement of Plaintiff Hodges, Nicholson James and Plaza are hereby dismissed in their entirety, and it is further ordered that the parties hereto shall take such other actions necessary to effectuate the conclusions of law reached herein.

I think that does allow for the submission of the order and the posting of the notice that your Honor has stated in his conclusions, and I would ask the indulgence of the court if Mr. Kahn would agree to that language, if we could get an order signed at this point given the exigencies of the circumstances.

MR. KAHN: Your Honor, I would respectfully oppose the proposed order. I certainly would not object to Mr. Delikat advising the NMB that you have dismissed the discharge claims, in fact, I will speak to the NMB or at least I will try to speak to the NMB officials before 2:00 and I will advise them of the same, that you have done it, that nobody is going to shilly-shally about it.

But that proposed order really doesn't fairly encompass your conclusions or findings or your order and I don't think that a document of that type which really serves only the convenience of the plaintiff in this suit should be entered.

I have another comment on another subject.

THE COURT: Mr. Delikat, on your proposed order, I think you are free to advise the NMB or anybody else of the fact which is that by my order entered on the record this morning, the individual claims for reinstatement and back pay are dismissed.

At least one problem with your proposed order, probably easily remedied, is that it should provide, although my findings may be amended or supplemented, they may not be changed in substance. You had something else, Mr. Kahn.

MR. KAHN: Two matters, your Honor.

Perhaps in trying to take notes and follow you I didn't hear—there were proposed findings with regard to a company union being formed or Mr. Pusateri attempting to establish an in-house union and deal with a minority union. Was that encompassed in the findings, your Honor?

THE COURT: I think those are words I never used in my findings. I found what he said and I reached conclusions, part of it violated the act.

MR. KAHN: I would like to apply for an extension of the time to proposed amendments, the reason being that I don't think we will have a transcript back in time to make proposed amendments. It was difficult to write down everything you said.

THE COURT: I don't think the time is critical. It probably makes life easier for you, Mr. Delikat.

MR. DELIKAT: I have no objection.

THE COURT: How long would you like?

MR. KAHN: Perhaps 20 days, your Honor.

THE COURT: No problem.

MR. KAHN: Could we extend our time to reach a notice, perhaps, to 20 days also?

THE COURT: Surely.

MR. KAHN: Thank you.

THE COURT: Court is adjourned.

[EXHIBIT 5]

62153590

62153590ESL UD

/JULIBEAR NYK

DATE: APRIL 27, 1988

TO: MR. CHARLES BARNES, EXECUTIVE DIRECTOR
NATIONAL MEDIATION BOARD, WASHINGTON, D.C.

RE: NMB CASE NO. 4-5768. VIRGIN ATLANTIC AIRWAYS

DEAR MR. BARNES:

PLEASE BE ADVISED THAT AT 11:20 A.M THIS DATE, JUDGE STANTON, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ANNOUNCED FINDINGS OF FACT AND CONCLUSIONS OF LAW ORDERING THE INDIVIDUAL CLAIMS FOR REINSTATEMENT OF PLAINTIFFS HODGES, NICHOLSON, JAMES AND PLAZA BE DISMISSED IN THEIR ENTIRETY.

VERY TRULY YOURS,

BAER MARKS & UPHAM
ATTORNEYS FOR VIRGIN ATLANTIC AIRWAYS, LTD.

BY: _____
MICHAEL DELIKAT

62153590ESL UD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CIV. No. 88-3163 (Judge Glasser)

VIRGIN ATLANTIC AIRWAYS, LTD., et al.,

Plaintiffs,

v.

NATIONAL MEDIATION BOARD, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, et al.,

Defendants.

DECLARATION OF CHARLES R. BARNES EXECUTIVE DIRECTOR OF THE NATIONAL MEDIATION BOARD

Charles R. Barnes hereby declares and states as follows:

1. I am the Executive Director of the National Mediation Board (Board) and I have held that position continuously since May, 1986. In my capacity as Executive Director, I am responsible for and oversee all representation matters arising under the Railway Labor Act (Act) which come before the Board. I am personally familiar with the regulations, policies, procedures and practices of the Board in connection with representation proceedings. From 1975 to 1986 I served at the NMB in the capacity of "Mediator", "Head Mediator", and "Regional Head Mediator".

2. The Executive Director is the National Mediation Board's chief executive officer and official custodian of the Board's files and records, including those pertaining to all representation cases. This declaration is based on my review of those records, as well as on my personal knowledge.

3. On February 17, 1988, the International Brotherhood of Teamsters Airline Division (IBT) filed an application dated

February 8, 1988 with the Board pursuant to Section 2, Ninth of the Act, seeking an investigation of an asserted representation dispute among the fleet service employees at Virgin Atlantic Airways (Virgin Atlantic). (Attachment 1). This investigation was assigned NMB Case No. R-5768. (Attachment 2).

4. On February 22, 1988, the Board issued a telegram to Virgin Atlantic and the IBT advising them that Board Representative (Mediator) Gale L. Oppenberg would commence the investigation of NMB Case No. R-5768 on March 1, 1988 at Virgin Atlantic's New York City office. (Attachment 3). In that telegram, the Board also requested Virgin Atlantic to furnish the Board with a list of potential eligible voters for Virgin Atlantic's fleet service employees.

5. On March 1, 1988, Board Representative Gale L. Oppenberg arrived at the office of the Carrier's attorneys to commence the field investigation in R-5768. After review of the employee list provided by Virgin Atlantic, the IBT submitted a copy of a complaint and supporting documentation filed on February 29, 1988, in the United States District Court for the Southern District of New York. (Attachment 4). Said complaint sought, among other things, "immediate and full reinstatement to Richard Hodges, Charles L. James, William Nicholson, Juan Plaza and Michael Wilson to their former positions . . ." at Virgin Atlantic.

6. During the March 1, 1988, meeting in New York City Board Representative Gale L. Oppenberg notified Virgin Atlantic and the IBT that their challenges and objections to the list of potential eligible voters furnished by Virgin Atlantic in NMB Case No. R-5768 were due no later than March 11, 1988.

7. On March 11, 1988, the Board received a letter from Virgin Atlantic objecting to the inclusion as potential eligible voters of Messrs. Hodges, James, Nicholson, Plaza, Soto and Wilson. (Attachment 5). Virgin Atlantic also requested that the Board "stay its processing of the application until the District Court makes a ruling on plaintiffs' allegations".

8. On March 14, 1988, the Board received a letter from the IBT requesting that Messrs. Hodges, James, Nicholson, Plaza, Soto and Wilson be included as potential eligible voters pursuant to Section 5.304 of the Board's Representation Manual. (Attachment 6). The letter also alleged "pervasive carrier interference with the election process" and requested an election by *Laker* ballot.

9. On March 15, 1988, counsel for the IBT telephoned the NMB to withdraw, while reserving the right to raise the matter at a later dated, the IBT's previous request received on March 14, 1988 for an election by *Laker* ballot. IBT stated this decision was based on the fact that it was more important to have a speedy election than to spend the time needed by the Board to develop a record on the question of carrier interference and a *Laker* ballot.

10. On March 21, 1988 the NMB issued a telegram, standard in form, finding "a dispute to exist in R-5768" and authorizing a mail ballot election, the standard agency election procedure. The term "box" used in this telegram was an obvious typographical error and was not applied. (Attachment 7). The February 26, 1988 "cut-off date" directed by this telegram solely precludes individuals who were newly hired into the craft or class subsequent to that date from being eligible to vote. It does not preclude the NMB's consideration of other eligibility evidence which may have developed subsequent to the "cut-off date."

11. On March 25, 1988 Virgin Atlantic submitted to the NMB address labels covering all employees on the list of potential eligible voters with the exception of three individuals the carrier stated were "no longer eligible." (Attachment 8).

12. On March 29, 1988 Virgin Atlantic submitted address labels for the three individuals not submitted on March 25, 1988 while "reserving all rights" that said individuals were "ineligible to vote." (Attachment 9).

13. By letter dated March 30, 1988 (Attachment 10) NMB Mediator Oppenberg transmitted the "Official List of Eligible Voters" as well as the Notice and Rules of Election in NMB Case No. R-5768 to Virgin Atlantic and the IBT. Mediator Oppenberg's letter notified the participants in R-5768, that Messrs. Hodges, James, Nicholson, Plaza and Wilson were determined to be "eligible voters" pursuant to NMB Representation Manual Section 5.304 due to their pending "action for reinstatement". The list of eligible voters also reflected the fact that one of the individuals seeking reinstatement with Virgin Atlantic, Jose Soto, had been recalled to work. An appeal deadline of April 11, 1988 was specified. In addition, Mediator Oppenberg's letter notified the participants that the ballots would be mailed on April 1, 1988 and counted on April 25, 1988 as specified on the official Notice and Rules of Election. Consistent with established NMB policy, Virgin Atlantic was requested to post the Notice and Rules of Election on carrier bulletin boards.

14. The NMB's official Notice and Rules of Election utilized in R-5768 is standard in form and content. (Attachment 11). Consistent with NMB policy, the date for the "COUNT OF BALLOTS" is specified on the first page, which in this case was April 25, 1988. The election in R-5768 was by standard mail ballot with the ballots mailed on Friday, April 1, 1988 and directed to be counted on Monday, April 25, 1988. This election period is quite within the NMB's customary election duration. At the time the election period and count date were established the NMB was not aware of any anticipated date or dates for the resolution of the court case relating to the reinstatement of the five discharged employees found eligible by Mediator Oppenberg.

15. On April 11, 1988 the NMB received a letter from Virgin Atlantic requesting the deletion of Ms. Rapczynski, Ms. Quevedo and Mr. Ruiz from the "election eligibility list." (Attachment 12).

16. On April 15, 1988 Mediator Oppenberg ruled by telegram that Ms. Rapczynski, Ms. Quevedo and Mr. Ruiz were

ineligible. (Attachment 13). An appeal deadline of April 22, 1988 was provided.

17. On April 19, 1988 the NMB received a telegram from Virgin Atlantic stating that "on April 25, Judge Stanton will hold a final trial on the merits and will determine whether said individuals were discharged in violation of the RLA." The telegram also requested the NMB to take various steps to revise established NMB procedures so that the eligibility of Messrs. Hodges, James, Nicholson, Plaza and Wilson would be determined at some point subsequent to the official count date of April 25, 1988 if the Court had not ruled by then. (Attachment 14).

18. On April 19, 1988 the NMB received a telegram from Virgin Atlantic asserting that Mr. Michael Wilson was ineligible to vote. (Attachment 15). Mr. Wilson was one of the individuals named in the reinstatement action involving Virgin Atlantic but he was subsequently recalled to work and then, according to the carrier's letter he resigned "for a second time."

19. On April 20, 1988 the NMB issued a telegram which advised the participants in R-5768 that "ballots received by the Board . . . will be impounded at 2:00 p.m. on Monday, April 25, 1988 and counted at a later date after all questions of eligibility have been determined." (Attachment 16). This telegram did not change the official count date of April 25, 1988 but, rather, provided for the preservation of the eligibility conditions as they existed on that date until the NMB could attend to the eligibility issues raised regarding Mr. Michael Wilson and other possible eligibility matters the agency was unable to attend to during the week of April 18, 1988. Ordinarily such matters would have been resolved prior to the April 25, 1988 count date but from April 18, 1988 to April 22, 1988 the entire NMB leadership and mediators were attending a special agency conference in Quebec, Canada. The necessary agency decisionmakers similarly were unavailable on Saturday, April 23 and Sunday, April 24 preceding the count date.

20. On April 26, 1988 the NMB issued a formal published decision, 15 NMB 170, which had been personally approved in writing by the Members of the Board in accordance with customary agency policy. (Attachment 17). Said decision reflected a consistent application of established NMB policy with regard to precluding changes in the official count date. The NMB's determination that "the status quo as it existed on the original count date must be preserved" is fully consistent with my experience over the years as well as my understanding of standard agency practice.

21. On April 26, 1988 the NMB received a telegram from Virgin Atlantic requesting that "the ballots not be counted until the court rules". (Attachment 18).

22. On April 26, 1988 the NMB issued a telegram to Virgin Atlantic and the IBT containing the full text of the April 26, 1988 decision published at 15 NMB 170. (Attachment 19).

23. On April 26, 1988 the NMB issued a telegram confirming that the ballot count physically would take place in Washington, D.C. on April 27, 1988. (Attachment 20).

24. On April 26, 1988 counsel for Virgin Atlantic and the IBT each called the NMB offices concerning the status, date and time of the ballot count in R-5768. Hearing Officer David Strom took these phone calls. After inquiry, counsel for Virgin Atlantic was advised that any unresolved eligibility decisions would be made consistent with the Board procedures including the NMB's Findings at 15 NMB 170. Conversation with counsel for the IBT pertained only to the date and time of the ballot count in R-5768.

25. On April 27, 1988 the ballots in NMB Case No. R-5768 were opened, and counted. Ballots were received from 12 of the 21 eligible voters and all of these ballots were valid and cast for the IBT. The NMB April 27, 1988 Report of Election Results confirms these results. (Attachment 21). Consistent with the NMB's ruling in 15 NMB 170 (Attachment 17), Michael Wilson was removed from the list of eligible voters because it was reported to the NMB that prior to

2:00 p.m., April 25, 1988: 1) he had been dismissed from the reinstatement action involving Virgin Atlantic; and 2) he had voluntarily resigned from Virgin Atlantic, after being rehired, on March 14, 1988.

26. On April 28, 1988, the NMB received a telegram from Virgin Atlantic apparently sent on April 27 stating that the court would rule in the "Hodges" case "this morning" and noting various matters concerning eligibility and the count of ballots. (Attachment 22).

27. On April 28, 1988 the NMB received a telegram from Virgin Atlantic apparently sent on April 27 stating that the claims for reinstatement of Messrs. Hodges, Nicholson, James and Plaza had been "dismissed in their entirety." (Attachment 23).

28. On May 2, 1988, the NMB issued a "Certification" in R-5768, 15 NMB 179, following approval by the Members of the Board. (Attachment 24). Said Certification officially declared that the IBT had been "duly designated and authorized to represent for the purpose of the Railway Labor Act, as amended, that craft or class of Fleet Service Employees, employees of Virgin Atlantic Airways."

29. Copies of the NMB May 2, 1988 Certification in R-5768 were sent to Virgin Atlantic and the IBT by the NMB's transmittal letter dated May 2, 1988. (Attachment 25).

30. On June 24, 1988 the NMB received a transmittal letter dated June 22, 1988 from Virgin Atlantic as well as an attached letter dated May 20, 1988. (Attachment 26). The May 20, 1988 letter stated that the NMB should not have counted the four ballots associated with the litigation before Judge Stanton.

31. On June 24, 1988 the NMB advised Virgin Atlantic that the issues raised in the Carrier's May 20, 1988 letter previously had been brought to the Board's attention and resolved by the NMB's decision of April 26, 1988. (Attachment 27).

32. The Board's "Representation Manual" conspicuously provides in a "Notice" on the cover page that the "manual provides general procedural guidance to the Board's staff with respect to the processing of representation cases" and that its provisions are "neither obligatory" on the Board "nor do they constitute the exclusive procedure for the Board's investigation of representation matters." Other applicable or potentially applicable portions of the Manual are included herein. (Attachment 28).

33. On October 31, 1988 the NMB received a copy of an "JUDGMENT AND ORDER" in *Richard Hodges, et al.* v. *Virgin Atlantic Airways, Ltd.* which was signed by Judge Stanton on June 8, 1988 and "FILED" on June 9, 1988. (Attachment 29). This document states that the claims of Messrs. "Hodges, Nicholson, James, Plaza and Wilson are hereby dismissed in their entirety". In addition, the Court found that a "representative" of Virgin Atlantic had "violated Section 2, Third and Fourth of the Railway Labor Act."

34. The documents attached hereto are true copies of those portions of the official files of the Board referred to as "Attachments" in this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 1988, in the City of Washington, the District of Columbia.

/s/ CHARLES R. BARNES

Charles R. Barnes
Executive Director
National Mediation Board

ATTACHMENT 1 Form NMB3 aproved.
OMB No. 3140-0002

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

TO THE NATIONAL MEDIATION BOARD,
Washington, D.C. 20572

A dispute has arisen among the employees of VIRGIN ATLANTIC AIRWAYS as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Parties to dispute

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
AIRLINE DIVISION

(Petitioning organization or representative)

Craft or class of employees involved

If more than one craft or class, list separately	Estimated Number of Employees
1. FLEET SERVICE	22

Evidence of representation

This application is supported by (check applicable box):

☐ At least a majority, if the employees are represented.

☒ At least 35%, if the employees are unrepresented.

Signed at NEW YORK this 8 day of FEBRUARY, 1988

Name /s/ WILLIAM F. GENOESE

(Signature of applicant)

WILLIAM F. GENOESE

Title DIRECTOR, AIRLINE DIVISION

ATTACHMENT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

88 CIV.

RICHARD HODGES, CHARLES L. JAMES, WILLIAM NICHOLSON, JUAN PLAZA, JOSE SOTO, MICHAEL WILSON and LOCAL 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Plaintiffs,

—against—

VIRGIN ATLANTIC AIRWAYS, LTD.,

Defendant.

VERIFIED COMPLAINT AND JURY DEMAND

Plaintiffs, by their attorney Stephen H. Kahn, complaining of Defendant Virgin Atlantic Airways, Ltd. allege as follows:

JURISDICTION AND VENUE

1. The jurisdiction of this court is invoked under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et. seq.* and the Federal Aviation Act, 49 U.S.C. § 1371 (k)(4).

2. Venue lies in the Southern District of New York where Defendant has a place of business.

NATURE OF ACTION

3. This is an action for injunctive and other equitable relief, including back wages and reinstatement, to restrain Defendant from engaging in, and continuing to engage in, wrongful and unlawful conduct violative of its employees' rights of self- * * * *

PARTIES

4. Richard Hodges, Charles L. James, William Nicholson, Juan Plaza, Jose Soto, and Michael Wilson (the "Individual Plaintiffs") are individuals residing in the State of New Jersey. The Individual Plaintiffs were all employed by Defendant Virgin Atlantic Airways, Ltd. ("Virgin Air") in its Virgin Atlantic Cargo Division at its Newark, New Jersey facility in the position of freight agents until their employment was wrongfully terminated on or about February 6, 1988.

5. Plaintiff Local 851, International Brotherhood of Teamsters ("Union"), an unincorporated association, is a labor organization with offices in Valley Stream, New York.

6. Virgin Air, a corporation, is a common carrier by air engaged in interstate commerce within the meaning of RLA Title II, § 201, 45 U.S.C. § 181, and is subject to the general duties of Title I, § 2, of said Act, 45 U.S.C. § 152.

7. Virgin Air employs approximately twenty-two employees, excluding managerial employees and office clericals, at its Newark cargo-handling facility.

STATEMENT OF CLAIM

8. In late December, 1987, a union which upon information and belief is named the United Food and Commercial Workers Union, commenced an organizing campaign among the freight agents at Virgin Air's Newark Facility.

9. In late December, 1987, Virgin Air's Vice President, Colin Tubb, threatened to fire any employee who supported a union or attempted to unionize Virgin Air's employees. Shortly thereafter, in response to Virgin Air's threats, the organizing drive was abandoned.

10. In January, 1988, the Plaintiff Union began an organizing campaign among the employees of Virgin Air at its Newark terminal. As part of its campaign, the Union met with

employees and requested that they sign cards authorizing the Union to both represent them and to request the National Mediation Board to conduct an election for representation purposes in accordance with the Railway Labor Act.

11. In mid-January, 1988, more than one-half of the non-managerial, non-office clerical employees employed by Virgin Air at its Newark facility signed union authorization cards.

12. Management officials employed by Virgin Air at its Newark facility knew of the Union's organizing campaign at least as early as January 20, 1988.

13. Beginning in January, 1988, Virgin Air engaged in a widespread and pervasive course of conduct to interfere with, influence and coerce its employees; to prevent them from designating the Union as their representative; and to deny or question the right of its employees to join, organize or assist in organizing the labor organization of their choice. Such conduct has included the following acts:

A. The president of Virgin Air's Atlantic Cargo North American Division held a captive audience speech among some of its employees during which he threatened to discharge Union adherents, threatened to close Virgin Air's Newark facility in order to discourage unionization; threatened to transfer all of Virgin Air's work to another employer; and promised to improve wages and benefits if employees would abandon their support of the Union or any other labor organization.

B. Various Virgin Air officials individually interrogated employees in order to discover their attitudes towards unionization and to coerce employees to abandon their support of the Union.

C. Various Virgin Air officials engaged in surveilance of employees and created the impression of surveilance in order to discourage employees from freely designating any union as their representative.

14. Plaintiffs Hodges, James, Nicholson, Plaza, Soto and Wilson, all of the Individual Plaintiffs, were discharged from their employment with Virgin Air on or about February 6, 1988 because they supported the Union and in fulfillment of the threat to fire union adherents. Soto, alone among the Individual Plaintiffs, has subsequently been recalled to employment.

15. The Railway Labor Act provides in relevant part at Section 2, Third and Fourth, 45 U.S.C. § 152, Third and Fourth:

> Representatives . . . shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Section 2, Third
>
> No carrier, its officers, or agents shall deny or in any way question the rights of its employees to join, organize, or assist in organizing the labor organization of their choice and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . Section 2, Fourth

16. The acts and conduct by Virgin Air alleged above violates RLA Section 2, Third and Fourth, RLA § 152, Third and Fourth.

17. As a proximate result of Virgin Air's wrongful conduct:

A. The Individual Plaintiffs and their co-workers at Virgin Air's Newark facility are fearful of losing their jobs because of the organizing campaign.

B. The Individual Plaintiffs and their co-workers at Virgin Air's Newark facility have been chilled in the exercise of their

rights to organize and freely choose a collective bargaining representative.

C. Plaintiff Union's organizing campaign has stalled.

D. The Individual Plaintiffs will be deprived of their opportunity to vote in the election which it is anticipated the National Mediation Board will conduct in the near future, this permanently depriving them of their statutory right to express their choice of representative.

E. The Individual Plaintiffs have been deprived of their livelihoods and will not be able to provide the necessaries of life for themselves and their families.

18. Virgin Air's conduct has caused irreparable and continuing harm which cannot be remedied in an action at law or an administrative proceeding; and greater injury will be inflicted on the Individual Plaintiffs and the Union by the denial of injunctive relief than could possibly be inflicted upon Virgin Air by granting such relief.

WHEREFORE Plaintiffs request the following relief:

1. That this Court issue a preliminary injunction: A) enjoining and restraining Defendant, its officers, representatives, agents, servants, employees, and all persons acting in concert or participation with them pending final disposition of the matters in this lawsuit, from in any manner interfering with, influencing or coercing its employees in their choice of representative by any means including: threatening employees with economic or other reprisal because of their participation in activities on behalf of any union; interrogating employees about union activities; engaging in surveilance, or creating the impression or such surveilance of union activity; threatening plant closure to discourage union activity; soliciting grievances or expressions of employee dissatisfaction, or promising benefits to discourage union activity; and interfering with or influencing organizational activity or membership in the Union by laying off, discharging, or in any other manner terminating the employment of employees in order to discourage them from participating in union activity; B)

ordering Defendant to offer immediate and full reinstatement to Richard Hodges, Charles L. James, William Nicholson, Juan Plaza, and Michael Wilson, to their former positions, without prejudice to their seniority or other rights and privileges, and to refrain from interfering with, influencing, coercing or discriminating against them or Plaintiff Jose Soto in the future, and to make all Individual Plaintiffs whole for all lost wages and other benefits which they lost as the result of their discharges, including interest; and C) Ordering Defendant to conspicuously post copies of this preliminary injunctive order at locations in Virgin Air's Newark facility regularly frequented by employees without written comment thereon, for a period of sixty days.

2. That on final determination hereof, the Court issue a permanent injunction restraining and enjoining the same acts and conduct and directing the same actions preliminarily ordered.

3. That Plaintiffs each be awarded $1,000,000 punitive damages.

4. That Plaintiffs be awarded their costs.

5. That the Court grant to Plaintiffs such other and further relief that may be equitable, including the reasonable award of attorney's fees for the public service performed.

/s/ STEPHEN H. KAHN

STEPHEN H. KAHN
Attorney for Plaintiffs
35 Worth Street
New York, New York 10013
(212) 966-8686

JURY DEMAND

Plaintiffs demand trial by jury.

/s/ STEPHEN H. KAHN

STEPHEN H. KAHN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

88 CIV.

RICHARD HODGES, CHARLES L. JAMES, WILLIAM NICHOLSON, JUAN PLAZA, JOSE SOTO, MICHAEL WILSON and LOCAL 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Plaintiffs,

—against—

VIRGIN ATLANTIC AIRWAYS, LTD.,

Defendant.

VERIFICATION

STATE OF NEW YORK)
: SS
COUNTY OF NEW YORK)

Anthony Farino, being duly sworn, deposes and says:

I am the President of Local 851, International Brotherhood of Teamsters, a named Plaintiff herein allied in interest with all of the named Plaintiffs. I have read the attached verified complaint and believe it to be true. The basis for my belief is interviews and meetings with the individual named Plaintiffs.

/s/ ANTHONY FARINO
Anthony Farino

Sworn to and subscribed before me
on this 29th day of February, 1988

/s/ STEPHEN H. KAHN
Notary Public

[NOTARY SEAL]

ATTACHMENT 10

[LETTERHEAD OF THE NATIONAL MEDIATION BOARD]

March 30, 1988

Stephen H. Kahn, Esq.
35 Worth Street
New York, N.Y. 10013

Michael Delikat, Esq.
Baer, Marks & Upham
805 Third Avenue
New York, N.Y. 10022

Gentlemen:

Enclosed please find copies of the Official List of Eligible Voters in NMB Case # R 5768. Please review it carefully.

NMB Representation Manual Section 5.304 provides that employees have been terminated but who have an action for reinstatement before a court of competent jurisdiction shall be eligible to vote. I have therefore determined that Richard Hodges, Charles L. James, William Nicholson, Juan Plaza and Michael Wilson are eligible voters and their names have been added to the list.

You have the right to appeal the above decision and any other issue to NMB. All appeals must be in writing and must be supported by substantive evidence and argument rather than unsupported allegations. Your appeal should clearly indicate that you have provided a copy to the other participants in the case. All appeals must be received at the NMB's offices no later than close of business on April 11, 1988. Appeals which are not received by this time will be denied as untimely.

The carrier has recently informed us that Lillian Quevedo has been promoted and that Victoria Rapcaynski and Michael Wilson have resigned. The carrier requests that their names be removed from the list. Any comments with regard to this issue must be submitted in writing and must be received at

the NMB's offices no later than close of business on April 11, 1988. The carrier and organization should submit documents supporting their positions. After receiving this information I will rule on the eligibility of these individuals and you will then be given an opportunity to appeal my decision on this issue to the NMB.

Also enclosed are copies of the Notice of Election and sample Ballots. The carrier is directed to immediately post these on carrier bulletin boards, at least one per station so that employees will be notified of the election in a timely manner. The Ballots will be mailed on April 1, 1988, and will be counted at 2 P.M., April 25, 1988, at the NMB's offices in Washington D.C.

Sincerely,

/s/ GALE LYNN OPPENBERG
Gale Lynn Oppenberg
Mediator

ATTACHMENT 11

FORM NMB-R-1

UNITED STATES OF AMERICA

NATIONAL MEDIATION BOARD
NOTICE AND RULES OF ELECTION

Washington D.C. R 5768 April 1, 1988

TO ALL CONCERNED:

This notice of election to be held under the Railway Labor Act involves the following:

FLEET SERVICE OF EMPLOYEES

OF

VIRGIN ATLANTIC AIRWAYS

SOUGHT TO BE REPRESENTED BY:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (AIRLINE DIVISION)

AND PRESENTLY

UNREPRESENTED

COUNT OF BALLOTS:

2:00 P.M., April 25, 1988, Washington D.C.

When applicable, a ballot box voting schedule is attached hereto and made a part hereof.

Gale Lynn Oppenberg /s/ GALE LYNN OPPENBERG

BOARD REPRESENTATIVE, NATIONAL MEDIATION BOARD, WASHINGTON, D.C. 20572

THIS IS THE ONLY OFFICIAL NOTICE OF THE ELECTION AND MUST NOT BE DEFACED BY ANYONE.

NOTICE

An election, pursuant to Section 2, Ninth of the Railway Labor Act, will be conducted by secret ballot under the supervision of the Board Representative, whose name is affixed hereto, among the eligible voters described on the attachment to this NOTICE OF ELECTION, to determine the question of representation presently before the NATIONAL MEDIATION BOARD.

Section 2, Fourth, of the Railway Labor Act, provides that "The majority of any craft or class of employees shall have the right to determine who shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

The Railway Labor Act further provides that elections shall be free from interference, influence or coercion, and that it is unlawful for a carrier to interfere with the organization of its employees. Electioneering will not be permitted within the voting area perimeters established by the Board Representative.

Violations should be reported immediately to the Board Representative or the NATIONAL MEDIATION BOARD, Washington, D.C. 20572.

RULES OF ELECTION

BALLOTING

Balloting will be conducted in the manner prescribed in the attached NOTICE OF ELECTION. In the event the election is conducted by United States Mail, official secret ballots will be mailed by the Board Representative to the eligible voters. Instructions for voting by mail will be included with each ballot. SHOULD ANY ELIGIBLE VOTER FAIL TO RECEIVE A BALLOT WITHIN A REASONABLE TIME, SUCH VOTER SHOULD PERSONALLY REPORT THE FACT TO THE BOARD REPRESENTATIVE IN CARE OF

THE NATIONAL MEDIATION BOARD, WASHINGTON, D.C. 20572.

ELIGIBILITY

All employees in the crafts(s) or class(es) referred to in this NOTICE OF ELECTION who appear on the payroll of the carrier during the designation period and who retain an employment relationship with the carrier on the date the vote is taken, and those individuals with rights to recall, not appearing on the above mentioned payroll, whose last service performed was in the involved craft or class are eligible to vote.

A dismissed individual whose request for reinstatement, alleging wrongful dismissal, is pending before proper authorities (including the National Railroad Adjustment Board, other appropriate Boards, or any court of competent jurisdiction) is eligible to participate. A dismissed employee whose guilt has been determined, and who is seeking reinstatement on a leniency basis is not eligible.

VOTERS LIST

A list of the eligible voters has been prepared by the Board Representative, based upon information furnished by the carrier, and opportunity has been afforded party representatives to review the list. Only those individuals whose names appear on the list will be permitted to vote, except that upon proof of error, such error will be corrected.

SUPERVISION OF ELECTION

The Board Representative is personally responsible to the National Mediation Board for the conduct of the election. Only the Board Representative and an individual voter will be allowed to handle the ballot in order to maintain its secrecy. The Board Representative will interpret and apply the rules governing the election and shall decide on all challenged votes. The Board Representative's decisions shall be final as to the immediate conduct of the election, but appeal may be

made to the National Mediation Board, provided that timely notice of such appeal is given in writing to the Board Representatives. Each organization that is a party to this dispute may, if it so desires, appoint an observer. Such observers shall be under the supervision and direction of the Board Representative at all times.

ELECTION RESULTS

The Board Representative will count and tabulate all ballots at a time and place designated by the Board Representative. A report giving the results of the election will be made by the Board Representive on a form prescribed by the National Mediation Board and copy of this report will be furnished to the parties to the dispute and the carrier involved.

CERTIFICATION

Certification of the name or names of the organization or individual that has been designated and authorized to represent the employees involved in this dispute will be made by the National Mediation Board to the parties to the dispute and the same will also be certified to the carrier.

DISPOSITION OF BALLOTS

The original ballots and tabulation sheets together with the report of the results of the election by the Board Representative will be filed with the National Mediation Board, Washington, D.C. 20572, for reference and safekeeping.

By order of the NATIONAL MEDIATION BOARD.

UNITED STATES OF AMERICA

OFFICIAL BALLOT OF NATIONAL MEDIATION BOARD

Involving CASE NO. R5768

FLEET SERVICE EMPLOYEES

Employees of

VIRGIN ATLANTIC AIRWAYS

April 1, 1988–April 25, 1988

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

If you desire to be represented by:
International Brotherhood of Teamsters (Airline Division)
Mark an "X" in this square .....☐

If you desire to be represented by:
ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual on the line below:

_____, AND

Mark an "X" in this square .....☐

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.
2. Marks in more than one square make ballot void.
3. Do not cut, mutilate or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Board representative and obtain a new one.

UNITED STATES OF AMERICA

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY U.S. MAIL

THE CONTENTS OF THE NOTICE OF ELECTION; THE OFFICIAL BALLOT; AND THE INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY U.S. MAIL CONSTITUTE THE ONLY OFFICIAL RULES GOVERNING THIS ELECTION. NO ONE IS AUTHORIZED TO PROMULGATE ANY RULE OR PROCEDURE CONTRARY TO THOSE REFERRED TO HEREIN.

An Official Ballot and a return-addressed mailing envelope (no postage required) are enclosed herewith. To vote by mail, carry out the following instructions:

Mark an "X" in the square of your choice, fold and place the ballot in the mailing envelope. After sealing the mailing envelope, PRINT your name on the first line under the attest on the back of the envelope, and SIGN your name on the second line. Deposit this envelope, which requires no postage, in the U.S. Mail so as to reach the designated location for the count prior to the time and date indicated.

2 P.M., April 25, 1988

After the mailing envelope has been checked against the eligibility list, your folded ballot will be removed from the envelope and thoroughly mixed with other ballots before being unfolded and counted by the Board Representative, thus insuring complete secrecy.

YOUR BALLOT CANNOT BE COUNTED UNLESS YOU COMPLETE THE ATTEST ON THE BACK OF THE MAILING ENVELOPE.

ATTACHMENT 14

EASYLINK MBX 3930818C001 19APR88 12:04/12:34 EST
VIA: 892710
TO: 62153590
NMB WSH CI

RECEIVED BY THE
NATIONAL MEDIATION
BOARD
DATE: APR 19 1988

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

RE: VIRGIN ATLANTIC AIRWAYS CASE NO. R-5768

GENTLEMEN:

WE ARE COUNSEL FOR THE CARRIER IN CONNECTION WITH THE ABOVE-REFERENCED PROCEEDING. A COUNT OF BALLOTS IN AN ELECTION PRESENTLY UNDERWAY IS SCHEDULED TO BE HELD AT 2:00 P.M. APRIL 25, 1988. FOR THE REASONS SET FORTH BELOW, WE HEREBY REQUEST THAT THE COUNTING OF THE BALLOTS BE DELAYED ONE DAY UNTIL APRIL 26, 1988, AND THAT THE BALLOTS OF THE FIVE INDIVIDUALS NAMED BELOW, IF THEY ARE DETERMINATIVE OF THE OUTCOME OF THE ELECTION, BE IMPOUNDED AND NOT OPENED UNTIL THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK RULES ON THE ISSUE OF WHETHER SAID INDIVIDUALS WERE DISCRIMINATORILY DISCHARGED UNDER THE RLA. SUCH RULING IS EXPECTED SHORTLY.

PRIOR TO THE NMB'S SCHEDULING OF THE BALLOT COUNT HEREIN FOR APRIL 25, JUDGE STANTON HAD SCHEDULED A TRIAL ON THE MERITS IN HODGES ET AL. V. VIRGIN ATLANTIC AIRWAYS, LTD., 88 CIV. 1370 (S.D.N.Y.), ALSO FOR APRIL 25 IN NEW YORK CITY. COUNSEL FOR BOTH PARTIES THEREFORE WILL BE IN FEDERAL COURT IN NEW YORK IN CONNECTION WITH THIS CASE ON THE SAME DAY THAT THE BALLOTS ARE NOW SCHED-

ULED TO BE COUNTED. SINCE THE UNDERSIGNED HEREBY REQUESTS THE OPPORTUNITY TO BE PRESENT AT THE BALLOT COUNT IN ACCORDANCE WITH SEC. 12.305, WE THEREFOR REQUEST THAT THE COUNT BE DONE THE FOLLOWING DAY, ALTHOUGH THE TIME FOR RECEIPT OF BALLOTS SHOULD NOT BE ALTERED.

THE HODGES ACTION IS ONE WHICH ALEGES THAT CERTAIN FORMER EMPLOYEES 0F THE CARRIER, HODGES, JAMES, NICHOLSON, PLAZA AND WILSON WERE DISCRIMINATORILY TERMINATED IN VIOLATION OF THE RLA. THEIR EMPLOYMENT WITH THE CARRIER ENDED ON FEBRUARY 7, 1988. BUT FOR THE FILING OF THIS LAWSUIT, THESE INDIVIDUALS WOULD NOT BE ELIGIBLE TO VOTE. (SEC. 5.304).

ON APRIL 25, JUDGE STANTON WILL HOLD A FINAL TRIAL ON THE MERITS AND WILL DETERMINE WHETHER SAID INDIVIDUALS WERE DISCHARGED IN VIOLATION OF THE RLA. SEC. 5.304 PROVIDES THAT AN INDIVIDUAL SHALL NOT BE ELIGIBLE IF THE COURT ACTION DETERMINES THAT THE DISCHARGE WAS NOT IMPROPER. IT IS OUR UNDERSTANDING THAT THE COURT WILL RULE EXPEDITIOUSLY AFTER THE CLOSE OF THE EVIDENCE ON APRIL 25. GIVEN THAT FACT, AND GIVEN THAT THE INCLUSION OR EXCLUSION OF THESE FIVE INDIVIDUALS WILL OBVIOUSLY HAVE A SIGNIFICANT IMPACT ON THIS ELECTION WHERE THERE ARE ONLY SEVENTEEN OTHER ELIGIBLE VOTERS, WE HEREBY REQUEST THAT THE BOARD FOLLOW THE PROCEDURES SET FORTH BELOW:

1. THE BALLOTS OF THE 5 ABOVE-NAMED INDIVIDUALS BE PLACED IN CHALLENGED BALLOTS ENVELOPES.

2. THE REMAINING UNCHALLENGED BALLOTS SHOULD BE COUNTED. IF THE FIVE CHALLENGED BALLOTS ARE NOT DETERMINATIVE OF THE OUT-

COME, THEY CAN THEN BE OPENED AND COUNTED. IF THE 5 CHALLENGED BALLOTS ARE DETERMINATIVE OF THE OUTCOME, THEY SHOULD NOT BE OPENED UNLESS THE FEDERAL COURT RULES THAT THESE INDIVIDUALS WERE DISCRIMINATORILY DISCHARGED.

WE BELIEVE THAT THIS PROCEDURE, WHICH IS SIMILAR TO THAT FOLLOWED BY THE NATIONAL LABOR RELATIONS BOARD IN AN NLRB CHALLENGED BALLOT SITUATION, IS WARRANTED HERE BECAUSE OF THE SMALL SIZE OF THE UNIT AND THE FACT THAT A COURT DECISION ON THE TERMINATIONS IN QUESTION WILL BE FORTHCOMING SHORTLY. TO ALLOW THESE BALLOTS TO BE COUNTED BEFORE THE COURT RULES MAY IN EFFECT PLACE THE OUTCOME OF THE ELECTION IN THE HANDS OF INDIVIDUALS WHO ARE NOT EMPLOYEES AND HAVE NO STAKE IN THE CARRIER'S OPERATION. THIS CLEARLY WOULD NOT BE IN ACCORDANCE WITH THE PURPOSES OF THE RLA.

IN SUM, WE RESPECTFULLY REQUEST THAT THE NMB GRANT THIS APPLICATION IN ITS ENTIRETY. A COPY OF THIS TELEX HAS BEEN FAXED TO COUNSEL FOR THE UNION.

VERY TRULY YOURS,

BAER MARKS + UPHAM
ATTORNEYS FOR VIRGIN ATLANTIC AIRWAYS
BY: ////////////////////////////////
MICHAEL DELIKAT

CC: STEPHEN KAHN, ESQ. (VIA FAX)
NMB WSH CI

ATTACHMENT 17

[LETTERHEAD OF THE NATIONAL MEDIATION BOARD]

15 NMB No. 51
April 26, 1988

Michael Delikat, Esq.
Counsel for Virgin Atlantic Airways
Baer, Marks & Upham
805 Third Avenue
New York, N.Y. 10022

Re: NMB Case No. R-5768
Virgin Atlantic Airways

Dear Mr. Delikat:

This is in response to your telegram to the Board concerning the above case. The Carrier has requested that all ballots be impounded one day until April 26, 1988. A further request from the Carrier concerns the ballots of certain individuals which "if they are determinative of the outcome of the election [should] be impounded and not opened until the United States District Court of the Southern District of New York rules on the issue of whether said individuals were discriminately discharged under the RLA."

The Carrier's request to impound the ballots of those individuals who have a pending action for reinstatement is denied. Pursuant to Section 1206.6 of the Board's Rules, 29 CFR 1206.6, and Section 5.304 of the Board's Representation Manual, individuals are found eligible to vote where they have an action pending for reinstatement due to wrongful dismissal before a court of competent jurisdiction. In such situations the Board will not delay the counting of ballots by suspending its normal procedures until the court rules on the reinstatement action. We note that the Carrier made a similar request for delay to the Board Representative and it was properly denied.

In *Air Florida*, 10 NMB 294 (1983), the Carrier requested that the Board delay the further handling of the representa-

tion case until the Court of Appeals for the Eleventh Circuit had ruled on an action in which the Board was a defendant. The Board stated in response to the Carrier's request for delay "consistent with the objectives of the Railway Labor Act, it is the policy of the National Mediation Board to continue to investigate representation disputes during the pendency of litigation unless enjoined by the court." We have not been presented with a persuasive reason for deviating from our established policy in this instance.

Accordingly, all ballots of eligible employees will be counted at 2:00 p.m. on Wednesday, April 27, 1988. Further, when " 'the impounding of ballots results in a delay of the count date set in the Notice and Rules of Election, the status quo as it existed on the original count date must be preserved in order to prevent any change in the outcome as it would have been in the absence of the delay.' " *Continental Airlines*, 14 NMB 131 (1987), *quoting Altair Airlines*, 7 NMB 489 (1980).

By direction of the National Mediation Board.

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

Copies to:

Mr. William Genoese
Steven Kahn, Esq.
Wilma Liebman, Esq.
Mr. David Tait

ATTACHMENT 18

EASYLINK MBX 9041631A001 26APR88 14:05/14:09 EST
VIA: 62153590

APR 26 3:29 PM '88
NATIONAL MEDIATION
BOARD

TO: 62153590

62153590ESL UD
MR. CHARLES BARNES
EXECUTIVE DIRECTOR OF THE NATIONAL
MEDIATION BOARD WASHINGTON, D.C.

RE: NNB CASE NO. R-5768
VIRGIN ATLANTIC AIRWAYS

DEAR MR. BARNES:

YOUR TELEX SENT TODAY WAS DELIVERED TO ME AT THE FEDERAL COURT WHERE WE ARE IN THE MIDST OF CONCLUDING THE ACTION HODGES V. VIRGIN ATLANTIC AIRWAYS, 88 CIV. 1379, A SUIT WHERE THE DISCHARGES OF THE FOUR INDIVIDUALS IN QUESTION HAS BEEN CHALLENGED. AT THE CLOSE OF THE CASE YESTERDAY, JUDGE STANTON STATED THAT HE WOULD DECIDE THE CASE EXPEDITIOUSLY AFTER THE CLOSE OF THE EVIDENCE TODAY. IN FACT, IT IS POSSIBLE THAT THE JUDGE MAY RULE FROM THE BENCH. MOREOVER, AT THE START OF THE TRIAL HEREIN, THE PLAINTIFFS WITHDREW THE NAME OF MICHAEL WILSON FROM THE LAWSUIT ON THE GROUNDS THAT MR. WILSON HAD ENLISTED IN THE ARMED SERVICES AND HAD NO FURTHER INTEREST IN REINSTATEMENT OR THE LAWSUIT.

MOREOVER, WE STRENUOUSLY OBJECT TO THE CONTENTS OF YOUR LASTEST TELEX WHICH DIRECTLY CONTRADICTS YOUR TELEX OF APRIL 19 WHEREIN YOU STATED THAT THE BALLOTS WILL

BE IMPOUNDED UNTIL "AFTER ALL QUESTIONS OF ELIGIBILITY HAVE BEEN DETERMINED". IN VIEW OF THE FACT THAT WE EXPECT RULING FROM THE COURT IMMINENTLY, WE AGAIN RENEW OUR REQUEST THAT THE BALLOTS NOT BE COUNTED UNTIL THE COURT RULES THIS WEEK.

VERY TRULY YOURS

BAER MARKS + UPHAM
ATTORNEYS FOR VIRGIN ATLANTIC AIRWAYS
BY: MICHAEL DELIKAT

62153590ESL UD

ATTACHMENT 19

7105812780+

APR 26 1:00 PM '88
NATIONAL MEDIATION
BOARD

MICHAEL DELIKAT
COUNSEL FOR VIRGIN ATLANTIC AIRWAYS

RE: NMB CASE NO. R-5768, VIRGIN ATLANTIC AIRWAYS

DEAR MR. DELIKAT:

THIS IS IN RESPONSE TO YOUR TELEGRAM TO THE BOARD CONCERNING THE ABOVE CASE. THE CARRIER HAS REQUESTED THAT ALL BALLOTS BE IMPOUNDED ONE DAY UNTIL APRIL 26, 1988. A FURTHER REQUEST FROM THE CARRIER CONCERNS THE BALLOTS OF CERTAIN INDIVIDUALS WHICH "IF THEY ARE DETERMINATIVE OF THE OUTCOME OF THE ELECTION [SHOULD] BE IMPOUNDED AND NOT OPENED UNTIL THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK RULES ON THE ISSUE OF WHETHER SAID INDIVIDUALS WERE DISCRIMINATIVELY DISCHARGED UNDER THE RLA."

THE CARRIER'S REQUEST TO IMPOUND THE BALLOTS OF THOSE INDIVIDUALS WHO HAVE A PENDING ACTION FOR REINSTATEMENT IS DENIED. PURSUANT TO SECTION 1206.6 OF THE BOARD'S RULES, 29 CFR 1206.6, AND SECTION 5.304 OF THE BOARD'S REPRESENTATION MANUAL, INDIVIDUALS ARE FOUND ELIGIBLE TO VOTE WHERE THEY HAVE AN ACTION PENDING FOR REINSTATEMENT DUE TO WRONGFUL DISMISSAL BEFORE A COURT OF COMPETENT JURISDICTION. IN SUCH SITUATIONS THE BOARD WILL NOT DELAY THE COUNTING OF BALLOTS BY SUSPENDING ITS NORMAL PROCEDURES UNTIL THE COURT RULES ON THE REINSTATEMENT ACTION. WE NOTE THAT THE CARRIER MADE A

SIMILAR REQUEST FOR DELAY TO THE BOARD REPRESENTATIVE AND IT WAS PROPERLY DENIED.

IN AIR FLORIDA, 10 NMB 294 (1983), THE CARRIER REQUESTED THAT THE BOARD DELAY THE FURTHER HANDLING OF THE REPRESENTATION CASE UNTIL THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAD RULED ON AN ACTION IN WHICH THE BOARD WAS A DEFENDANT. THE BOARD STATED IN RESPONSE TO THE CARRIER'S REQUEST FOR DELAY "CONSISTENT WITH THE OBJECTIVES OF THE RAILWAY LABOR ACT, IT IS THE POLICY OF THE NATIONAL MEDIATION BOARD TO CONTINUE TO INVESTIGATE REPRESENTATION DISPUTES DURING THE PENDENCY OF LITIGATION UNLESS ENJOINED BY THE COURT." WE HAVE NOT BEEN PRESENTED WITH A PERSUASIVE REASON FOR DEVIATING FROM OUR ESTABLISHED POLICY IN THIS INSTANCE.

ACCORDINGLY, ALL BALLOTS OF ELIGIBLE EMPLOYEES WILL BE COUNTED AT 2:00 P.M. ON WEDNESDAY, APRIL 27, 1988. FURTHER, WHEN " 'THE IMPOUNDING OF BALLOTS RESULTS IN A DELAY OF THE COUNT DATE SET IN THE NOTICE AND RULES OF ELECTION, THE STATUS QUO AS IT EXISTED ON THE ORIGINAL COUNT DATE MUST BE PRESERVED IN ORDER TO PREVENT ANY CHANGE IN THE OUTCOME AS IT WOULD HAVE BEEN IN THE ABSENCE OF THE DELAY.' " CONTINENTAL AIRLINES, 14 NMB 131 (1987), QUOTING ALTAIR AIRLINES, 7 NMB 489 (1980).

BY DIRECTION OF THE NATIONAL MEDIATION BOARD. ORIGINAL DELIKAT, TELEX COPY KAHN AND MAIL COPIES TO GENOESE, LIEBMAN AND TAIT.

CHARLES R. BARNES
EXECUTIVE DIRECTOR
NATIONAL MEDIATION BOARD
892710 (RL/DS/JB/12:50 4/26/88 Tue 10:46)

BATCH MESSAGE NUMBERS 9010612A THRU 9010613A
ACCEPTED 2 MESSAGES

EASYLINK

9010621A 26APR88 11:57 EST
PTS

ATTACHMENT 20

APR 26 4:26 PM '88
NATIONAL MEDIATION
BOARD

7105812780+

MICHAEL DELIKAT
COUNSEL FOR VIRGIN ATLANTIC AIRWAYS
BAER MARKS & UPHAM

RE: NMB CASE R-5768, VIRGIN ATLANTIC AIRWAYS

AS DISCUSSED IN OUR PRIOR TELEGRAM OF THIS DATE, THE BALLOT COUNT IN THE ABOVE CASE WILL TAKE PLACE AT 2:00 P.M., WEDNESDAY, APRIL 27, 1988 AT THE BOARD'S OFFICES IN WASHINGTON, DC. YOUR REQUEST FOR A DELAY OF THE COUNT IS DENIED. ORIGINAL DELIKAT. COPY KAHN.

CHARLES R. BARNES, EXEC DIR, NATIONAL MEDIATION BOARD
TLX 89-2710 (RL/AK16:20) 4/26/88 Tue 14:26

MMMM

BATCH MESSAGE NUMBERS 9070011A THRU 9070012A
ACCEPTED 2 MESSAGES

EASYLINK

9070028A 26APR88 15:25 EST
PTS

ATTACHMENT 21

UNITED STATES OF AMERICA

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5768

DATE ISSUED 4/27/88

LOCATION WASHINGTON, DC

FLEET SERVICE
of
VIRGIN ATLANTIC AIRWAYS
sought to be represented by

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
(AIRLINE DIVISION)
and currently
UNREPRESENTED

REPORT OF ELECTION RESULTS

The undersigned Board Representative of the National Mediation Board certifies that the results of the tabulation of ballots cast in the election held in the above case; and concluded on the date indicated above, were as follows:

1. Number of eligible voters..... 21

2. Void Ballots..... 0

3. Votes Cast for INTERNATIONAL BROTHEROOD OF TEAMSTERS AIRLINE DIVISION 12

4. Votes Cast For _____

_____ 0

5. Votes Cast For _____

_____ 0

6. Valid votes counted (sum of 3, 4 and 5)..... 12

For the NATIONAL MEDIATION BOARD

/s/ W. A. GILL JR.
W. A. Gill, Jr.
Board Representative

Attest:

The undersigned party observer(s), present at the counting and tabulation of the ballots indicated above, do hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballot was kept inviolate; and that the results were indicated above. We also acknowledge service of this tally.

For Carrier	For [ILLEGIBLE]
/s/ MICHAEL DELIKAT	[ILLEGIBLE]
Atty	[ILLEGIBLE]

ATTACHMENT 22

APR 28 7:36 AM '88
NATIONAL MEDIATION
BOARD

EASYLINK MBX 5574877C001 27APR88 09:14/06:28 EST
VIA: 62153590

TO: 62153590

62153590ESL UD

/JULIBEAR NYK

TO: MR. CHARLES BARNES, EXECUTIVE DIRECTOR
NATIONAL MEDIATION BOARD, WASHINGTON,
D.C.

RE: NMB CASE NO. 4-5768. VIRGIN ATLANTIC
AIRWAYS

DEAR MR. BARNES:

WE ARE IN RECEIPT OF YOUR SECOND TELEX YESTERDAY AGAIN DENYING OUR REQUEST AND WISH TO NOTE OUR CONTINUING OBJECTION. FIRST, THERE IS NO LOGICAL BASIS WHY A DECISION WAS ISSUED LAST WEEK ORDERING THAT THE BALLOT BE IMPOUNDED IN VIEW OF YOUR CONTRARY DETERMINATION YESTERDAY. MOREOVER, NONE OF THE CASES CITED IN YOUR TELEX YESTERDAY ARE APPOSITE SINCE AT ISSUE HERE IS SECTION 5.304 OF THE REPRESENTATION MANUAL WHICH WAS NOT AT ISSUE IN ANY OF THE OTHER CASES RELIED UPON BY THE NMB IN REACHING ITS DECISION HEREIN. STRONG POLICY REASONS ALSO DICTATE A RESULT CONTRARY TO YOUR CONCLUSION. WE AGAIN STATE THAT THE ELECTORAL PROCESS WILL BE IRREPARABLEY PREJUDICED BY A COMMINGLING OF THE BALLOTS BEFORE A DETERMINATION OF THIS ISSUE.

IN ANY EVENT, GIVEN YOUR PRESENT INTENTION TO GO FORWARD DESPITE OUR PROTESTS, I MUST ADVISE THE BOARD THAT THE COURT IS ORALLY RENDERING A DECISION IN THE HODGES ACTION THIS MORNING AT 10:30 A.M. AT WHICH I MUST BE PRESENT. I THEREUPON INTEND TO CATCH THE FIRST AVAILABLE FLIGHT TO WASHINGTON, D.C., BUT IN VIEW OF THE SHORT NOTICE OF THE BALLOT COUNT AND THE COURT'S DECISION TO RULE AT 10:30 A.M., I WOULD REQUEST THE COURTESY OF THE BOARD IN DELAYING THE COUNT OF BALLOTS UNTIL 3:30 P.M THIS AFTERNOON. MINIMAL DUE PROCESS REQUIRES THIS BRIEF ADJOURNMENT.

FINALLY, I POINT OUT THAT THERE HAS BEEN NO DETERMINATION WITH RESPECT TO THE ELIGIBILITY OF MR. WILSON, WHO WAS DISMISSED FROM THE INSTANT LAWSUIT ON THE MOTION OF THE PLAINTIFFS PRIOR TO 2:00 P.M. ON APRIL 25, 1988, AND HOW IN ANY EVENT, AFTER BEING RECALLED TO WORK AT THE CARRIER, RESIGNED TO ENLIST IN THE ARMED FORCES.

VERY TRULY YOURS,

BAER MARKS & UPHAM
ATTORNEYS FOR VIRGIN ATLANTIC AIRWAYS, LTD.

BY: _____
MICHAEL DELIKAT

62153590ESL UD

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

(2)

No. 91-1873

In the Supreme Court of the United States

OCTOBER TERM, 1992

VIRGIN ATLANTIC AIRWAYS, LTD., ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202)-514-2217

QUESTION PRESENTED

Whether, under this Court's decisions in *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), and *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), the district court had jurisdiction to review a decision of the National Mediation Board that certain of petitioner Virgin Atlantic's fleet service employees were eligible to vote in a representation election conducted by the Board under the Railway Labor Act, 45 U.S.C. 151 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Air Line Pilots Ass'n v. *Texas Int'l Airlines*, 656 F.2d 16 (2d Cir. 1981)	6
Air Line Pilots Ass'n, Int'l v. *Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir.), cert. denied, 484 U.S. 963 (1987)	6
Altair Airlines, Inc., 7 N.M.B. 489 (1980)	10, 11
American Air Export & Import Co. v. *O'Neill*, 221 F.2d 829 (D.C. Cir. 1954)	6-7
America West Airlines, Inc. v. *National Mediation Bd.*, No. 90-16337 (9th Cir. July 7, 1992)	8
Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964)	7
British Airways Bd. v. *National Mediation Bd.*, 685 F.2d 52 (2d Cir. 1982)	6
Brotherhood of Ry. & S.S. Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965)	5, 6, 7, 8, 9, 12
Brotherhood of Ry. & S.S. Clerks v. *Atlantic Coast Line R.R.*, 201 F.2d 36 (4th Cir.), cert. denied, 345 U.S. 992 (1953)	7
Continental Airlines, 14 N.M.B. 131 (1987)	10, 11
Delpro Co. v. *Brotherhood of Ry. Carmen*, 676 F.2d 960 (3d Cir. 1982)	8
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	11
International Ass'n of Machinists & Aerospace Wkrs. v. *Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988)	9

Cases—Continued: Page

International Bhd. of Teamsters v. *Brotherhood of Ry. Clerks*, 402 F.2d 196 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968) 6
International Longshoremen's Ass'n v. *North Carolina Ports Auth.*, 463 F.2d 1 (4th Cir.), cert. denied, 409 U.S. 982 (1972) 8
Leedom v. *Kyne*, 358 U.S. 184 (1958) 7
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10
Professional Cabin Crew Ass'n v. *National Mediation Bd.*, 872 F.2d 456 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989) 6, 9
Ruby v. *American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964) 6
Rutas Aereas Nacionales, S.A. v. *Edwards*, 244 F.2d 784 (D.C. Cir. 1957) 6
Sedalia-Marshall-Boonville Stage Line, Inc. v. *National Mediation Bd.*, 574 F.2d 394 (8th Cir.), cert. denied, 439 U.S. 881 (1978) 6
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 10-11
Switchmen's Union v. *National Mediation Bd.*, 320 U.S. 297 (1943) 5, 6, 12
United States v. *Feaster*, 410 F.2d 1354 (5th Cir.), cert. denied, 396 U.S. 962 (1969) 8
Trans World Airlines, 13 N.M.B. 220 (1986) 10, 11
WES Chapter, Flight Engineers' Int'l Ass'n v. *National Mediation Bd.*, 314 F.2d 234 (D.C. Cir. 1962) 6, 9
Zantop Int'l Airlines, Inc. v. *National Mediation Bd.*, 732 F.2d 517 (6th Cir. 1984) 6

Statute and regulation:

Railway Labor Act, 45 U.S.C. 151 *et seq.*:
§ 2, Ninth, 45 U.S.C. 152, Ninth 2, 6, 7, 9, 10
29 C.F.R. 1206.6 ..... 2, 10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1873

VIRGIN ATLANTIC AIRWAYS, LTD., ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 956 F.2d 1245. The order of the district court (Pet. App. 25a-27a) is unreported. The decisions of the National Mediation Board (Pet. App. 28a-29a, 83a-84a) are reported at 15 N.M.B. 170, 179.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1992. The petition for a writ of certiorari was filed on May 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 17, 1988, the National Mediation Board received an application filed by the International Brotherhood of Teamsters pursuant to Section 2, Ninth of the Railway Labor Act asking the Board to investigate an alleged representation dispute among fleet service employees of petitioner Virgin Atlantic Airways, Ltd. The Board promptly assigned a mediator to the case, and informed the parties that the investigation would commence with a meeting at Virgin Atlantic's offices on March 1, 1988. Pet. App. 54a-55a; C.A. App. 73-77.

During March, 1988, the Board's mediator met and corresponded with Virgin Atlantic and the Teamsters in order to determine the roster of employees eligible to vote on the question of representation. The mediator considered various circumstances brought to her attention by the parties, including the fact that six former employees had been discharged but had filed an action for reinstatement that was then pending in the U.S. District Court for the Southern District of New York. Pet. App. 55a-56a.

By letter dated March 30, 1988, the mediator established an official list of eligible voters, set a deadline of April 11 for appeals concerning eligibility, and informed the parties that ballots would be mailed on April 1 and counted on April 25. Pet. App. 57a, 71a-72a. The employees seeking reinstatement were included as eligible voters pursuant to the Board's rules (29 C.F.R. 1206.6; Pet. App. 33a) and the normal procedures reflected in the Board's Representation Manual (Pet. App. 35a-36a). At the time the election period and count date were established (in accordance with the Board's customary procedures), the Board was not aware of any particular

anticipated date for the resolution of the reinstatement litigation. Pet. App. 57a.

On April 11, 1988, the Board received a letter from Virgin Atlantic contesting the eligibility of three employees, and on April 15 the mediator ruled in Virgin Atlantic's favor. Pet. App. 57a-58a; C.A. App. 103-105. On April 19, Virgin Atlantic requested that the Board remove from the eligibility list Michael Wilson, an employee who had been a party to the reinstatement action, because Virgin Atlantic asserted that he had been recalled to work but had subsequently resigned. Pet. App. 58a; C.A. App. 109. On the same date (six days before the scheduled ballot count), Virgin Atlantic sent a separate telegram informing the Board that trial of the reinstatement action had been scheduled (before the mediator set the date for the representation election) for April 25. The company requested that the count be delayed for one day so that counsel could be present.[1] The company further requested that the ballots of the individuals seeking reinstatement be specially handled and, if relevant to the outcome, counted only if the district court ruled in the employees' favor. Pet. App. 58a, 80a-82a.

On April 20, 1988, the Board sent the parties a telegram indicating that ballots received by the original cutoff time (2 p.m. on Monday, April 25) would be impounded at that time "and counted at a later date after all questions of eligibility [had] been determined." Pet. App. 43a, 58a. The telegram in effect reserved final determinations of eligibility (such as a ruling on the status of Michael Wilson)

---

[1] The telegram explicitly noted that the extension should not alter the cutoff time for the receipt of ballots by the Board. Pet. App. 81a.

until they could be made by the appropriate Board officials, all of whom were at a Board conference in Canada from April 18 through April 22, 1988. Pet. App. 58a. The telegram was silent regarding the date or time *as of which* determinations of eligibility would be made.

On April 26, one day after the responsible officials' return to Washington, the Board formally denied Virgin Atlantic's request to deviate from its normal procedures and accord special treatment to the ballots cast by the employees involved in the reinstatement action. Pet. App. 83a-84a. The Board did, however, find Michael Wilson ineligible to vote based on the information supplied by Virgin Atlantic. Pet. App. 59a-60a. In accordance with the Board's decision, the ballots were opened and counted on April 27, 1988. The Board received ballots from 12 of the 21 voters it had determined to be eligible, and all 12 ballots were ruled valid and cast in favor of the Teamsters. Pet. App. 59a, 91a-92a. The Board thereafter certified the Teamsters as the representative of Virgin Atlantic's fleet service employees. Pet. App. 28a-29a, 60a.

The ballots received included four from plaintiffs in the reinstatement action, who remained eligible under the Board's rules as of the cutoff time of 2 p.m., April 25, because their reinstatement action was still pending at that time.[2] (Pet. App. 40a, 83a-84a.) The district court did not dismiss their reinstatement claims until the morning of April 27, the day of the physical ballot count (which took place

---

[2] Of the six original plaintiffs in the reinstatement action, two including Michael Wilson) were rehired by Virgin Atlantic before the election and the decision in the case.

in the afternoon) but two days after the cutoff date and impoundment of the ballots. *Id.*

2. Virgin Atlantic and certain of its employees brought this action in federal district court to challenge the Board's certification. The district court denied the Board's motions to dismiss or for summary judgment, asserting jurisdiction on the ground that the Board's action "grossly violated" the Railway Labor Act. C.A. App. 215-216, 314-321. The district court granted petitioners' motion for summary judgment, and entered final judgment against the Board. Pet. App. 25a-27a.

The court of appeals reversed (Pet. App. 1a-24a). The court determined that the record did not suggest that the Board had violated the Railway Labor Act or petitioners' constitutional rights. The court therefore concluded that the district court lacked jurisdiction to review the Board's decisions.

ARGUMENT

The court of appeals' decision is correct under, and indeed compelled by, this Court's decisions in *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), and *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*Railway Clerks*). The holdings of those cases have been so consistently followed over the past half century that Virgin Atlantic does not even argue that the decision below creates a conflict with any decision of this Court or of another court of appeals. This case involves no more than a routine representation dispute resolved by the Board in accordance with its statutory mandate and standard procedures, and does not warrant review by this Court.

1. a. Congress has vested the National Mediation Board with plenary authority to resolve representation disputes under the Railway Labor Act and to protect the employees' statutory right under Section 2, Ninth of the Act to elect a bargaining representative. See 45 U.S.C. 152, Ninth. This Court has twice recognized in no uncertain terms that Congress intended the Board—and not the judiciary—to have the final word in resolving representation questions. As the Court has explained, Congress intended that such a dispute would "reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Switchmen's Union*, 320 U.S. at 305. See also *Railway Clerks*, 380 U.S. at 659. The courts of appeals have repeatedly adhered to the principle that Board decisions concerning representation elections are not subject to judicial review.[3]

---

[3] See, *e.g.*, *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989); *Air Line Pilots Ass'n, Int'l* v. *Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir.), cert. denied, 484 U.S. 963 (1987); *Zantop Int'l Airlines, Inc.* v. *National Mediation Bd.*, 732 F.2d 517 (6th Cir. 1984); *British Airways Bd.* v. *National Mediation Bd.*, 685 F.2d 52 (2d Cir. 1982); *Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 656 F.2d 16, 20 n.6 (2d Cir. 1981); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.*, 574 F.2d 394, 397-399 (8th Cir.), cert. denied, 439 U.S. 881 (1978); *International Bhd. of Teamsters* v. *Brotherhood of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 253-256 (2d Cir. 1963) (Friendly, J.), cert. denied, 376 U.S. 913 (1964); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.*, 314 F.2d 234, 236-237 (D.C. Cir. 1962); *Rutas Aereas Nacionales, S.A.* v. *Edwards*, 244 F.2d 784, 785 (D.C. Cir. 1957); *American Air Export & Import Co.* v. *O'Neill*, 221

This Court did recognize in *Railway Clerks* that while Congress precluded judicial review of Board representation decisions, the courts may afford a remedy for "an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act*." 380 U.S. at 659-660 (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)). The Court emphasized, however, that this was an exception with " 'narrow limits' and 'painstakingly delineated procedural boundaries.' " *Id.* at 660 (quoting *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

b. The court of appeals correctly determined that there was no basis for the district court to exercise jurisdiction under this limited exception. In *Railway Clerks*, where an employer challenged the Board's definition of the appropriate "craft or class" of employees within which to hold a representation election, the Court held that the Board's action was "reviewable only to the extent that it [bore] on the question of whether [the Board] performed its statutory duty to 'investigate' the dispute" under Section 2, Ninth of the Act. 380 U.S. at 661. Applying that standard to this case, it is clear that the Board proceeded expeditiously and thoroughly to meet with the parties to the dispute, solicit their views on the eligibility of voters, review and resolve challenges to eligibility (based on the facts as it determined them to be and on its own established rules and procedures), and hold the election. As the court of appeals found (Pet. App. 13a), neither the statute nor *Railway Clerks* required more. See 380 U.S. at 661-666. Judicial review was accordingly foreclosed.

F.2d 829, 830 & n.4 (D.C. Cir. 1954); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, 201 F.2d 36, 38-39 (4th Cir.), cert. denied, 345 U.S. 992-993 (1953).

Petitioners argue (Pet. 7-14) that the routine eligibility decisions made by the Board in this case were somehow "jurisdictional," and therefore subject to judicial review. Petitioners rely on cases where courts have found jurisdiction to review the Board's determination of whether an employer was a "carrier" under the Railway Labor Act.[4] But such cases raise the threshold question of whether the Board has any "power to act at all" to resolve representation disputes at a particular workplace, *Delpro*, 676 F.2d at 962, and are inapposite to the question in this case. There is no question that Virgin Atlantic is a carrier, that the Board's jurisdiction under Section 2, Ninth of the Act was properly invoked by the application filed with the Board by the Teamsters, and that the Board thereafter had both the power and the duty (see *Railway Clerks*, *supra*) to investigate the representation dispute, conduct elections if necessary, and certify a bargaining representative. Virgin Atlantic's complaint concerns only whether the Board properly allowed four particular individuals to vote in an election that the Board indisputably had the right to conduct.[5]

---

[4] See *Delpro Co.* v. *Brotherhood of Ry. Carmen*, 676 F.2d 960 (3d Cir. 1982); *International Longshoremen's Ass'n* v. *North Carolina Ports Auth.*, 463 F.2d 1 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir.), cert. denied, 396 U.S. 962 (1969).

[5] Similarly, in *America West Airlines, Inc.* v. *National Mediation Bd.*, No. 90-16337 (July 7, 1992), the Ninth Circuit upheld jurisdiction to review the Board's decision to send a notice to participants in a rerun election suggesting that the Board had found that the employer violated the Act by interfering with the prior election. The court concluded that the Board's jurisdiction is limited to investigating and resolving representation disputes, rather than adjudicating

Virgin Atlantic in essence alleges only that the Board mishandled a representation dispute—in particular, that it erred in determining who was eligible to participate and when eligibility would be determined. But as this Court has held, the Act unmistakably commits these very questions to the Board's discretion: Section 2, Ninth states that "[i]n the conduct of any election * * * the Board shall designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152, Ninth), leaving to the Board "the task of selecting the methods and procedures which it should employ in each case." *Railway Clerks*, 380 U.S. at 661-662. The courts of appeals have therefore repeatedly held that the determination of who is an employee eligible to vote in a representation election is not subject to judicial review. See, *e.g.*, *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, *supra*; *International Ass'n of Machinists & Aerospace Wkrs.* v. *Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.*, 314 F.2d 234 (D.C. Cir. 1962).

2. Petitioners argue that the Board's decision to count the four disputed votes somehow conflicted with the power of the district court that heard and ruled on the reinstatement action (Pet. 14-16). But the Board merely set a customary schedule for the election, including deadlines for the receipt of ballots and determinations of eligibility—before being informed

---

claims of employer interference. Even if correct, *America West* is irrelevant to the present case. Like the carrier definition cases, it involved allegations that the Board had stepped out of the role assigned to it by Congress, rather than merely charges that it had played that role incorrectly.

of the trial date set for the reinstatement action, and certainly before it had any reason to speculate about when a decision in that action might have been forthcoming. The Board's decision to count the votes of individuals who had claims for reinstatement pending, and thus were eligible voters under 29 C.F.R. 1206.6, as of the deadline for the receipt of ballots was eminently reasonable, and in any event well within the Board's plenary discretion to "establish the rules to govern the election." 45 U.S.C. 152, Ninth.[6] That decision in no way undercut the district court's power to determine the merits of the reinstatement case when and as it chose.[7]

3. Petitioners' claim that *Switchmen's Union* should be overruled also do not warrant review. This Court has repeatedly stated, of course, that it will rarely overrule prior precedent interpreting a statute. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989), citing *Square D Co.* v. *Niagara Frontier Tariff Bu-*

---

[6] The Board's decision to preserve the status quo as of the originally scheduled election date accorded with its general practice, as reflected in prior published decisions. *Continental Airlines*, 14 N.M.B. 131 (1987); *Trans World Airlines, Inc.*, 13 N.M.B. 220 (1986); *Altair Airlines*, 7 N.M.B. 489 (1980). See also Pet. App. 59a (¶ 20) (affidavit of Board's Executive Director).

[7] Any concern for the role of the courts in *representation disputes*, as opposed to reinstatement actions that might have incidental effects on representation, is misplaced; surely *Switchmen's Union* and fifty years of subsequent cases make clear that the courts' role in such disputes is minimal.

reau, Inc., 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Petitioners present no persuasive reason why this Court should take the highly unusual step of overruling such a well established statutory precedent.

Petitioners complain (Pet. 18) that lack of judicial review allows the Board to "concoct[]" policies like that of preserving the status quo on eligibility when ballots are for some reason not counted on the election date originally set by the Board. Petitioners' implication of the Board's ad hoc capriciousness in such matters is belied, however, by their own example: the status quo policy is based on standard Board practice set out years ago in publicly reported Board decisions. *Continental Airlines, supra*; *Trans World Airlines, supra; Altair Airlines, Inc., supra.* The policy is clear, logical, easy to apply and fair to all parties.

Petitioners' unsupported allegations that the Board has "embarked upon its own political agenda with little regard for effectuating the purpose of the statute" (Pet. 6) by making representation decisions "notoriously designed to produce outcome-determinative results which favor large national labor unions" (Pet. 18) also provide no reason to overrule the Court's longstanding interpretation of the Act.[8] Such allegations should instead be addressed to Congress, which can determine for itself whether the Board has abused its broadly delegated powers, and amend the Act to allow for judicial review if it sees fit to do so.

---

[8] These allegations might come as something of a surprise not only to the Board, but to the wide variety of "large national labor unions" that have rather regularly been the Board's adversaries before this and other courts.

This Court has twice made clear that Congress intended a representation dispute such as this one "to reach its last terminal point when the administrative finding was made." *Switchmen's Union*, 320 U.S. at 305; *Railway Clerks*, 380 U.S. at 659. In this case, the "dragging out of the controversy into other tribunals of law" that concerned the Court in *Switchmen's Union*, 320 U.S. at 305, has already consumed four years of legal, administrative and judicial time. There is no reason for this Court to examine the matter further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
FRANK A. ROSENFELD
Attorneys

JULY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45527

(3)

No. 91-1873

FILED
SEP 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Petitioners,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

MICHAEL DELIKAT
Counsel of Record
JILL L. ROSENBERG
ORRICK, HERRINGTON & SUTCLIFFE
599 Lexington Avenue
New York, New York 10022
(212) 326-8800

Attorneys for Petitioners

TABLE OF CONTENTS

PAGE

ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Altair Airlines, 7 N.M.B. 489 (1980) 4

America West Airlines v. National Mediation Board, No. 90-16337, 1992 U.S. App. LEXIS 15216 (9th Cir. July 7, 1992) 2, 3

Continental Airlines, 14 N.M.B. 131 (1987) 4

Leedom v. Kyne, 358 U.S. 184 (1958) 3, 4

Professional Cabin Crew Ass'n v. National Mediation Board, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 110 S. Ct. 497 (1989) 3

Trans World Airlines, 13 N.M.B. 220 (1986) 4

Statutes

Railway Labor Act

Section 1, Fifth, 45 U.S.C. § 151, Fifth 3
Section 2, Fourth, 45 U.S.C. § 152, Fourth 2, 3, 4
Section 2, Ninth, 45 U.S.C. § 152, Ninth 2, 3

Rules

NMB Rule 1206.06, 29 C.F.R. § 1206.06 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1873

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Petitioners,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Respondents.

PETITIONERS' REPLY BRIEF

Petitioners[1] respectfully submit this reply brief in further support of their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to address arguments raised by the National Mediation Board "NMB" or the "Board") in its Brief in Opposition ("NMB Br.").

---

1 Petitioners respectfully refer the Court to the previously filed Petition for a Writ of Certiorari for a description of Petitioner Virgin Atlantic Airways, Ltd.'s parent companies and subsidiaries.

ARGUMENT

1. Although the NMB seeks to label this case as a "routine representation dispute" (NMB Br. at 5) between a carrier and the NMB, this case goes to the heart of the majority representation principle of the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA" or "the Act"). Section 2, Fourth of the Act, 45 U.S.C. § 152, Fourth, provides that the majority of employees of a carrier shall have the right to determine whether that craft or class will be represented by a union. The NMB has, by its actions in this case, violated that principle by granting outcome determinative power to four individuals who were not "employees" of the carrier within the meaning of the RLA and thereby certifying a union where a majority of Virgin Atlantic employees did not vote for such representation. Judicial review of NMB actions is necessary to, at a minimum, protect this fundamental rule of majority choice. Simply put, does the NMB have the authority to give voting rights to individuals who indisputably are not "employees" within the meaning of the RLA?

2. Contrary to the NMB's suggestion (NMB Br. at 6-9), there are clear limits to the Board's powers in investigating and processing a representation dispute under Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth. These limits are highlighted by the Ninth Circuit's recent decision in *America West Airlines v. National Mediation Board*, No. 90-16337, 1992 U.S. App. LEXIS 15216 (9th Cir. July 7, 1992). In that case, the Ninth Circuit upheld jurisdiction to review the Board's decision to send a "special notice" to participants in a rerun election which declared unlawful actions of the carrier relating to the initial election. Contrary to the NMB's position that the Board's election procedures were not subject to review, the court reviewed the NMB's actions and ruled that the NMB had acted in excess of its statutory powers by distributing the notice. The court rejected the Board's contention that it could conduct an election in any way it saw fit, stating that "the Board errs in its assumption that its discretion in choosing the means to conduct a representation investigation is unfettered." *America West*,

1992 U.S. App. LEXIS 15216 at *12. As in *America West*, a federal court should have jurisdiction to determine whether certain actions taken by the NMB in the course of conducting an election in this case violated the Board's statutory authority.

Moreover, even the board concedes that *America West* stands for the proposition that the Court can review an action of the NMB where the Board "step[s] out of the role assigned to it by Congress." (NMB Br. at 9.) Here, Congress has authorized the Board in Sections 2, Fourth and Ninth of the RLA to conduct elections only of "employees" defined in Section 1, Fifth, 45 U.S.C. § 151, Fifth, as persons "in the service of a carrier." The Board "steps out" of that role when it intentionally grants outcome determinative voting power to individuals who are indisputably not "employees" within the meaning of the Act.

3. The Board also claims, relying on *Leedom v. Kyne*, 358 U.S. 184 (1958), that to obtain judicial review, it must be shown that the Board acted in excess of its statutory authority *and* contrary to a specific statutory prohibition. However, the Board's reliance on *Kyne* is misplaced. Courts have consistently declined to adopt the NMB's argument asserted here that judicial review is limited to violations of the RLA that are expressly negative in nature. *See America West*, 1992 U.S. App. LEXIS 15216 at *12; *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 460 n.2 (D.C. Cir.), *cert. denied*, 110 S. Ct. 497 (1989).

Moreover, such a reading of the Act attempts to avoid the literal language as well as the intent of both the statute and regulations. Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, expressly limits the Board's authority to conducting elections of "employees." Additionally, NMB Rule 1206.06, 29 C.F.R. § 1206.06, which qualifies Section 2, Ninth, permits only dismissed employees with *pending* reinstatement actions to participate in elections. Rule 1206.06 thus excludes from eligibility dismissed employees without pending reinstatement actions. This exclusion is confirmed by the NMB's Manual (35a-36a) which *expressly* states that such individuals *shall not be* considered eligible to participate in an election. Finally,

Section 2, Fourth, 45 U.S.C. § 152, Fourth, explicitly decrees that the majority of the relevant class or craft of employees shall determine issues of representation. Thus, judicial review is required since the NMB herein has "attempted [an] exercise of power that [has] been specifically withheld." *Kyne*, 358 U.S. at 189.

4. In defending its decision to ignore the ruling of the district court dismissing the reinstatement action of the four discharged individuals, the NMB argues that it is the Board's "policy" to preserve the status quo as of the original count date when the count has been delayed for some reason. However, the cases relied on by the NMB to support this proposition are inapposite. For example, in *Continental Airlines*, 14 N.M.B. 131 (1987), voter eligibility was preserved as of the date the ballots were impounded where the count was put off due to a pending bankruptcy proceeding. Similarly, in *Altair Airlines*, 7 N.M.B. 489 (1980), eligibility was preserved as of the date ballots were originally impounded where the count was postponed to resolve allegations concerning election conduct. In contrast to this case, the counts in those cases were postponed for reasons unrelated to critical issues of voter eligibility.

In *Trans World Airlines*, 13 N.M.B. 220 (1986), also cited by the NMB, the Board denied the carrier's motion for reconsideration of an earlier Board ruling that flight attendants working in another class and craft as of the count date were ineligible to vote, and in so doing, refused to extend the eligibility date to the date the NMB decided the carrier's motion, even though the ballot count had been delayed and the ballots impounded due to the unresolved eligibility issue. In that case, the Board's decision to maintain the status quo as of the original count date was sound since the delay could have affected the eligibility of persons not subject to the specific eligibility challenge made by the carrier.

In the instant case, the ballot count was delayed by the NMB specifically to determine the eligibility of the four discharged individuals. If the Board intended to maintain the status quo as of the original count date (April 25, 1988), its decision to delay

the ballot count in order to determine the discharged workers' eligibility was a completely meaningless one since there would have been no change in voter eligibility of the four discharged workers prior to April 25, given that the district court would not be ruling on the reinstatement claims until at least April 26.

5. The absence of an established NMB status quo policy is further evidenced by the NMB's attempt to "explain away" its April 19, 1988 telex (43a) granting Virgin's request for a postponement of the April 25, 1988 ballot count and its April 26, 1988 telex (83a-84a) reversing the April 19 ruling. The NMB suggests (NMB Br. at 3-4) that the April 19 telex was intended to reserve final determinations of eligibility (such as a ruling on the status of Michael Wilson) until the NMB officials returned from an out-of-town conference and that upon their return, such determinations were made via the April 26 telex. However, the April 26 telex made absolutely no findings with regard to Mr. Wilson's eligibility and on April 27, Virgin's counsel informed the NMB of that fact (93a-94a). Mr. Wilson's eligibility was not addressed by the NMB until the actual ballot count on April 27.

Contrary to the NMB's position today, the only possible interpretation of the NMB's April 19 telex is that which is clear on its face—that the NMB had granted Virgin's request to postpone the ballot count until all eligibility questions had been resolved, including those to be decided by the district court in the reinstatement action. The NMB's efforts in this case to create and then defend an illusory policy further underscore the need for meaningful judicial review of the NMB's arbitrary actions in this and other cases.

CONCLUSION

For the reasons set forth herein and in the Petition, Petitioners respectfully submit that a writ of certiorari be granted to review the decision below.

Dated: New York, New York
September 22, 1992

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE

Michael Delikat
Counsel of Record
Jill L. Rosenberg
Attorneys for Petitioners
599 Lexington Avenue
New York, New York 10022
(212) 326-8800